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# Personal Jurisdiction over Orb-Web Corporations: A Re-Routed Approach for "Change in the Navigation of Time"

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# PERSONAL JURISDICTION OVER ORB-WEB CORPORATIONS: A RE-ROUTED APPROACH FOR “CHANGE IN THE NAVIGATION OF TIME”

VIDHYA VENKATRAMAN IYER<sup>1</sup>

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### ABSTRACT

The law of personal jurisdiction lies at the heart of all litigation.<sup>2</sup> Our courts must recognize the rights of individuals as well as the rights of corporations. The motto placed at the entrance of the United States Supreme Court—"Equal Justice Under Law"—ensures the promise of equal justice under the law to all persons.<sup>3</sup> It expresses the ultimate responsibility of the Supreme Court of the United States (the "Court") as the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States and functions as a guardian and interpreter of the Constitution.<sup>4</sup> From the perspective of fairness, an individual needs protection without compromising a corporate defendant's goals in advancing its business.

The Court's recent decisions in (1) *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>5</sup> (2) *Daimler AG v. Bauman*,<sup>6</sup> (3) *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>7</sup> (4) *BNSF Railway Co. v.*

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<sup>2</sup> See STEPHEN C. YEAZELL, CIVIL PROCEDURE 5 (7th ed. 2008) [hereinafter YEAZELL].

<sup>3</sup> *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/constitutional.aspx> (last visited August 2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>6</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>7</sup> *J. McIntyre Mach, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

*Tyrrell*,<sup>8</sup> and (5) *Bristol-Myers Squibb Co. v. Superior Court of Cal. San Francisco Cty.*<sup>9</sup> raise serious need for re-routing courts' approaches to personal jurisdiction because majority approaches were biased against individuals and were inconsistent with the Court's motto. The Court never adequately considered the difference between corporations of the pre-industrial era and those of the modern-industrial era. Many modern-era corporate structures are extremely complex and often expand into the global market by organizing themselves in an orb-web formation.<sup>10</sup> Hence, the current analysis of jurisdictional law is the incorrect way to determine personal jurisdiction. To address this problem, this article explains the structure of orb-web corporations and offers three approaches to personal jurisdiction, emphasizing a presence model based on the birthplace of an orb-web corporation. This article advocates how our jurisdictional law can be re-routed to enhance fairness, all while assuring the Court's motto in an orb-web corporation's setting.<sup>11</sup>

## I. A TOUCHSTONE REQUIREMENT OF DUE PROCESS

### A. *Established Models of Personal Jurisdiction*

Our Constitution requires that a forum state must have power over an out-of-state corporate defendant before the forum state or federal court located within the state can compel the defendant to come to the state to defend a lawsuit.<sup>12</sup> The power theory rests on two prongs: (1) the due process,<sup>13</sup> and (2) notice.<sup>14</sup> Theoretically, state courts assert due process through two established models followed by proper and adequate notice:<sup>15</sup> (1) presence model,<sup>16</sup> or (2) minimum contacts model.<sup>17</sup> Federal courts are courts of limited subject-matter jurisdiction and in addition to

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<sup>8</sup> *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

<sup>9</sup> *Bristol-Myers Squibb Co. v. Super. Ct. Cal. San Francisco Cty.*, 137 S. Ct. 1773 (2017)

<sup>10</sup> *See infra* Part I.C.

<sup>11</sup> *See* discussion *infra* Parts I -IV; *see* McIntyre, 864 U.S. at 892 (Breyer J., concurring) ("the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain...the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction."); *see also* *Tyrrell*, 137 S. Ct. at 1789 (Sotomayor, J., concurring in part and dissenting in part); *see infra* text and accompanying note 261.

<sup>12</sup> U.S. CONST. art. IV, § 1 (stating that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

<sup>13</sup> *Id.*; PETER HAY ET AL., *CONFLICT OF LAW: CASES AND MATERIAL* 119 (13th ed. 2012) [hereinafter PETER HAY] ("The personal jurisdiction of the State court is limited by Due Process Clause of the Fourteenth Amendment; for federal courts, however, the relevant Due Process is the one found in Fifth Amendment.").

<sup>14</sup> *See* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>15</sup> *Id.* at 313-14.

<sup>16</sup> *See* *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (emphasizing physical presence within the forum's boundary), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 188 (1977).

<sup>17</sup> *Int'l Shoe Co. v. Washington*, 339 U.S. 306, 316 (1945).

exercising personal jurisdiction, they also require subject matter jurisdiction satisfying either (a) federal question jurisdiction<sup>18</sup> or (b) diversity jurisdiction.<sup>19</sup>

In the *presence model*, a corporate defendant must (1) be incorporated in the forum state; (2) have consented or waived to the forum state's jurisdiction, (3) have assets or property in the forum state; or (4) have its principal place of business in the forum state.<sup>20</sup> If a corporate defendant satisfies any of the prongs in the *presence model*, then the state courts, at least theoretically, can assert "general jurisdiction"<sup>21</sup> over such defendants.<sup>22</sup> General jurisdiction is defined as a court's "power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person whose legal rights are to be affected."<sup>23</sup> General jurisdiction asserted through the *presence model* is a *direct approach* against a corporate defendant for the cause of action arising anywhere in the world.

On the other hand, in the *minimum contacts model* (i) exercise of jurisdiction must be authorized by a state's long-arm statute; (ii) the state's long-arm statute must be consistent with the United States Constitution; and (iii) a corporate defendant must have purposeful contact with the forum state.<sup>24</sup> If a state's long-arm statute is unlimited, then the forum state can exercise jurisdiction over a non-resident corporate defendant to which it has connection or no connection at all.<sup>25</sup> In short, "the exercise of jurisdiction must not offend traditional notion of fair play and substantial justice."<sup>26</sup>

In addition, if a non-resident-corporate defendant's contact is purposeful, then under established models, specific or general jurisdiction can be asserted. The prevailing law states that specific jurisdiction is asserted when "affiliations between [a] forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate."<sup>27</sup>

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<sup>18</sup> 28 U.S.C. § 1331.

<sup>19</sup> 28 U.S.C. § 1332.

<sup>20</sup> Lecture Note: Professor Charles P. Cercone, Thomas M. Cooley Law School, Civil Procedure I (Spring 2011) [hereinafter Professor Cercone].

<sup>21</sup> See *infra* text accompanying notes 21-30.

<sup>22</sup> See YEAZELL, *supra* note 1, at 56-58.

<sup>23</sup> See Arthur T. Von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966); see also Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66, TEX. L. REV. 721, 727-28 (1988) (stating that professors Von Mehren & Trautman spelled the difference but did not specify which contacts might support general jurisdiction and which might establish specific jurisdiction).

<sup>24</sup> Professor Cercone, *supra* note 20.

<sup>25</sup> *Id.*

<sup>26</sup> *Int'l Shoe*, 339 U.S. at 316.

<sup>27</sup> See Von Mehren & Trautman, *supra* note 22, at 1136.

General jurisdiction asserted through the *minimum contacts model* is an *indirect approach* between a corporate defendant and the forum state.<sup>28</sup> In the early era, the state's long-arm statute and minimum contacts are designed to protect a state court's arbitrary assertion of jurisdiction over out-of-state defendants. Today, in essence, the *presence model* protects only out-of-state corporate defendants' interests unless corporate defendants are incorporated or have a principal place of business in the United States so as to satisfy "continuous and systematic operations, which is essentially regarded as home."<sup>29</sup> Although preferred justification for the *minimum contacts model* does not require actual presence, the Court's empirical component rests on the phrase "essentially at home."<sup>30</sup>

This phrase suggests that general jurisdiction can be asserted through either the *presence* or the *minimum contacts model*, but specific jurisdiction can only be asserted through the *minimum contacts model*. In addition, the *minimum contacts model* adapted by the Court subverted an *indirect* approach of general jurisdiction in the state courts. Thus, the Court allegedly overlapped two different jurisdictional models in general jurisdiction cases.

As a result, asserting general jurisdiction through either the *presence* or the *minimum contacts model* is very confusing and problematic to the courts and practitioners.<sup>31</sup> Ironically, these models stem from two early era cases involving property law and a corporate agent's activity in the forum State: *Pennoyer v. Neff*<sup>32</sup> and *International Shoe v. Washington*.<sup>33</sup>

Under the *minimum contacts model*, the Court has articulated that due process requires a non-resident corporation to establish meaningful contacts, ties, or relations with the forum state, which provide fair warning that a particular activity may subject the non-resident corporate defendant to the state's jurisdiction.<sup>34</sup> The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>35</sup>

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<sup>28</sup> See *supra* text accompanying notes 11-26.

<sup>29</sup> See *Goodyear*, 564 U.S. at 919; *Tyrrell*, 137 S. Ct. 1560 (Sotomayor, J., concurring in part and dissenting in part).

<sup>30</sup> See *id.*; *Tyrrell*, 137 S. Ct. 1560-61 (Sotomayor J. concurring in part and dissenting in part and stating that "[w]hat was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation.... It is individual plaintiffs, harmed by the actions of a far-flung foreign corporation, who will bear the brunt of...[this] approach and be forced to sue in distant jurisdiction.").

<sup>31</sup> See, e.g., *McIntyre*, 564 U.S. at 877-78 (describing the lower courts' analysis as confused); *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1781 ("the California Supreme Court's 'sliding scale approach' is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.")

<sup>32</sup> See discussion *infra* Part.I.A.1.

<sup>33</sup> See discussion *infra* Part.I.A.2.

<sup>34</sup> *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

<sup>35</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1979).

Under the Full Faith and Credit Clause, sister states must respect and enforce the judgment rendered by a forum state against foreign defendants unless the forum state does not have the power over an absent, out-of-state, or foreign defendant.<sup>36</sup> States must provide equal access to their courts for claims based on federal law if state courts would otherwise have jurisdiction under local jurisdictional rules.<sup>37</sup> In addition, under the Equal Protection Clause, corporations are persons.<sup>38</sup>

The Due Process Clause of the Fourteenth Amendment provides that the rights of life, liberty, and property “cannot be deprived except pursuant to constitutionally adequate procedures.”<sup>39</sup> Therefore, a state court cannot compel a nonresident defendant to come to the forum state to defend a lawsuit.<sup>40</sup> To that end, the Due Process Clause gives a defendant subjected to an unfair assertion of jurisdiction the right to attack that attempted assertion of jurisdiction.<sup>41</sup> The courts equally share important roles for domestic and international litigation for extended

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<sup>36</sup> U.S. CONST. art. IV, § 1 (requiring that a State must give to the judgment of sister States the same effect that such judgments have in the State of retention); 28 U.S.C. § 1738 (1982) (suggesting that the federal court must give full faith and credit to the State court’s judgment)

<sup>37</sup> See Lea Brilmayer and Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and Conflict of Laws*, 39 VA. L. REV 819, 826 (1983).

<sup>38</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (stating that States of the Union are not persons for Due Process purposes), *abrogated by* *Shelby Cty. of Ala. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>39</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

<sup>40</sup> *Kulko v. California Super. Ct.*, 436 U.S. 84, 91 (1978); NELSON P. MILLER, *CIVIL PROCEDURE IN PRACTICE* 35 (1st ed. 2011) [hereinafter PROFESSOR MILLER] (stating that “under the Full Faith and Credit Clause, a State must recognize another State’s judgment unless the first court, which delivers the judgment over the defendant, has no personal jurisdiction.”).

<sup>41</sup> *Riverside & Dan River Cotton Mills v. Menfee*, 237 U.S. 189, 195-96 (1915). The *Riverside* Court stated that

[T]he enforcement of due process under the 14th Amendment was without influence upon the power to render the judgment, since that limitation was pertinent only to the determination of when and how the judgment, after it was rendered, could be enforced. But this doctrine, while admitting the operation of the due process clause, simply declines to make it effective. That is to say, it recognizes the right to invoke the protection of the clause, but denies its remedial efficiency by postponing its operation, and thus permitting that to be done which, if the constitutional guaranty were applied, would be absolutely prohibited. Nevertheless, the obvious answer to the proposition is that wherever a provision of the Constitution is applicable, the duty to enforce it is imperative and all embracing, and no act, which it forbids, may therefore be permitted. The enforcement of due process under the 14th Amendment was without influence upon the power to render the judgment, since that limitation was pertinent only to the determination of when and how the judgment, after it was rendered, could be enforced. However, this doctrine, while admitting the operation of the due process clause, simply declines to make it effective. That is to say, it recognizes the right to invoke the protection of the clause, but denies its remedial efficiency by postponing its operation, and thus permitting that to be done which, if the constitutional guaranty were applied, would be absolutely prohibited. But the obvious answer to the proposition is that wherever a provision of the Constitution is applicable, the duty to enforce it is imperative and all-embracing, and no act which it forbids may therefore be permitted. *Id.*

availability of damages for intangible harm, flexible discovery rules, punitive damages, and fair jury trial.<sup>42</sup>

These established rules suggest that a corporation and an individual should be treated the same.<sup>43</sup> As applied to orb-web corporations, however, this seems to be an incorrect analysis of our personal jurisdiction laws.<sup>44</sup> Orb-web corporations are born in the United States, generally expand to other states, cross the nation's boundaries, and acquire property while availing themselves of the benefit and protection of United States' laws.<sup>45</sup> Thus, an orb-web corporation cannot argue that defending a lawsuit in the United States is burdensome, or that it has been discriminated against.<sup>46</sup>

Yet state courts have also increasingly relied on an incorrect application and analysis of these confusing precedents cases.<sup>47</sup> In addition, general and specific jurisdiction under the minimum contacts model is a significant contributor to the unmeaningful outcome of cases in state courts.<sup>48</sup> As a result, state courts have incorporated these two analyses in each case to determine personal jurisdiction, leading to confusion in jurisdictional law.<sup>49</sup> To begin with, this article examines the Court's pre-industrial era cases and their implications in present time.

### 1. *Pennoyer v. Neff*

In an early nineteenth century case, *Pennoyer v. Neff*, the Court used a direct assertion of jurisdiction and addressed an issue of sovereignty and introduced the Due Process Clause of the Fourteenth Amendment in personal jurisdiction analysis.<sup>50</sup> The Court adopted a conservative theory and held that a state possessed exclusive jurisdiction and sovereignty over persons and property within its territory and that no state should exercise "direct" jurisdiction and authority

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<sup>42</sup> PETER HAY, *supra* note 12, at 38, para. 3.

<sup>43</sup> See *supra* text and accompanying notes 34-40.

<sup>44</sup> See sources cited, *supra* notes 4-8.

<sup>45</sup> See *infra* diagram 1, p. 24.

<sup>46</sup> See also *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949) ("After a State has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the State's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis.").

<sup>47</sup> See, e.g., *Noll v. American Biltrite Inc.*, 395 P.3d 1021, 1026 (Wash. 2017) ("General jurisdiction requires extensive and systematic contacts with the forum state." (citing *Goodyear*, 564 U.S. at 923-24)); *Volkswagen Aktiengesellschaft v. Jones*, 2017 WL 2180984, No. 2D15-5716, \*6 (Fla. Ct. App. 2017) (stating that the plaintiff personally and unilaterally brought the car purchased from the defendant from New York to Florida and the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." (citing *Helicopteros*, 466 U.S. 408, 417 (1984))).

<sup>48</sup> See sources cited in *supra* notes 4-8

<sup>49</sup> See *id.*

<sup>50</sup> See *supra* text accompanying notes 41-46.



over persons or property beyond its territory.<sup>51</sup> The Court emphasized that every state owed protections to non-resident corporations having any property in the forum state.<sup>52</sup>

Since *Pennoyer*, when a non-resident defendant's property is within a state's border, a state or federal court in that jurisdiction has the power to adjudicate any kind of controversy related to that property.<sup>53</sup> The presence of assets or property provides a basis for adjudicating any claims against the defendant.<sup>54</sup> Thus, *Pennoyer* emphasized the states' volitional conduct, limited due process rights, and rigid standard to assert jurisdiction over non-resident defendants (and, of course, over the orb-web corporations). It is fair to say that the *presence model* mainly stemmed from *Pennoyer*.<sup>55</sup>

## 2. *International Shoe v. Washington*

In *International Shoe Co. v. Washington*,<sup>56</sup> on the other hand, the Court used an indirect assertion method and addressed the Due Process Clause of the Fourteenth Amendment. In *International Shoe*, the defendant, a Delaware corporation, was amenable to proceedings in the Washington state court to recover unpaid contributions to the state unemployment compensation fund enacted under state statute.<sup>57</sup> The Court held that the state court could assert personal jurisdiction over a Delaware corporation, which had its principal place of business in St. Louis, Missouri.<sup>58</sup> Although the corporate defendant was not registered to do business in Washington, it maintained business in several states other than in Washington.<sup>59</sup>

Additionally, the defendant did not have an office in Washington, did not have contracts for either sale or purchase of merchandise, and it did not stock any merchandise in the forum state.<sup>60</sup> The defendant did not make any deliveries to the forum state in interstate commerce.<sup>61</sup> The defendant only employed eleven of its employees under the corporation's direct supervision and control, who resided in Washington and rented office or hotel space for exhibiting samples for that

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<sup>51</sup> *Pennoyer*, 95 U.S. at 722-23 (stating that a State may obtain jurisdiction over defendants as long as they are subject to the State's physical power. A State derives its physical power from its status as an independent sovereign, which possesses and imposes authority over persons or property within its borders.).

<sup>52</sup> YEAZELL, *supra* note 1, at 64; FED. R. CIV. P. 4(k).

<sup>53</sup> *Pennoyer*, 95 U.S. at 722.

<sup>54</sup> *Id.*

<sup>55</sup> Professor Cercone, *supra* note 20.

<sup>56</sup> *Int'l Shoe*, 326 U.S. at 310.

<sup>57</sup> *Id.* at 311.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 313.

<sup>60</sup> *Id.* at 313.

<sup>61</sup> *Id.*

purpose.<sup>62</sup> The State argued that the corporation must pay tax to the state unemployment fund, as it was doing business in the State of Washington, but International Shoe argued that if the corporation had to pay taxes to Washington then it had to pay taxes to every states in which it did business.<sup>63</sup>

In *sum*, the Court created a new theory that a defendant must have “certain minimum contacts with the forum state such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>64</sup> The Court added that a non-resident corporate defendant’s contact with a forum state must be reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit; and an “estimate of the inconveniences” to a corporation having to litigate away from its “home” or principal place of business is a relevant consideration.<sup>65</sup>

Corporations are fictions; therefore, corporate activities must be carried through its agents.<sup>66</sup> Accordingly, either corporate agents’ presence or activities within the forum state satisfy due process.<sup>67</sup> States may thus make binding *in personam* judgments against individuals or corporate defendants if states have some contacts, ties, or relations.<sup>68</sup>

### 3. Takeaway from These Historical Cases

*International Shoe*’s main revolution was giving states the ability to reach out-of-state defendants through their long-arm statutes.<sup>69</sup> In addition, the Court recognized the presence of a corporation by the presence of its agents.<sup>70</sup> On the other hand, the *Pennoyer* rationale is simple: A state has the power over persons and things within its borders, but a state cannot sue an out-of-state defendant beyond its borders.<sup>71</sup> *Pennoyer* only focused on physical presence of persons or properties within state borders. Whereas *International Shoe* sought to expand the jurisdiction of a state court with liberal interpretation of the Due Process Clause and advocated a mere flexible standard of fairness by setting an example of a corporation’s behaviors and relationship with its

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<sup>62</sup> *Id.* at 314.

<sup>63</sup> *Id.* at 318.

<sup>64</sup> *Id.* at 316.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 316-17.

<sup>67</sup> *Id.* at 317 (stating, however, that the casual presence of the corporate agent or even the agent’s single or isolated activities in a State on the corporation’s behalf were not enough to subject the corporation to suit on causes of action unrelated with activities in the forum State).

<sup>68</sup> *Id.* at 319.

<sup>69</sup> *See* discussion *supra* Part I.A.2

<sup>70</sup> *See supra* text accompanying notes 56-67.

<sup>71</sup> *See Pennoyer*, 95 U.S. at 722-23.

domestic units.<sup>72</sup>

In *International Shoe*, the Court initiated five possible theories that fall within the *presence model*: (a) consent, (b) agency, (c) doing business, (d) state of incorporation, and (e) principal place of business.<sup>73</sup> In addition, it also activated a *minimum contacts model*. Although the *presence* and *minimum contacts models* stemmed from these two cases, neither *Pennoyer* nor *International Shoe* provided any appropriate guidance for orb-web corporations because in *Pennoyer* and *International Shoe*, the defendant was an individual or a single corporation with limited business activities.

Although both *Pennoyer* and *International Shoe* provided remarkable tools for a corporate defendant, the Court impermissibly blended the *presence* and *minimum contacts models* to determine general jurisdiction in subsequent cases. *Pennoyer* was decided in the pre-industrial era without modern transportation or communications, and *International Shoe* was decided with a more modern approach.<sup>74</sup>

#### 4. Inconsistent Approaches of Due Process

The Due Process Clause focuses on the relation among defendant, forum, and litigation in tort cases.<sup>75</sup> The case law certainly suggests that a non-resident corporate defendant can be sued far from and without the minimum contacts with the forum state.<sup>76</sup> Even though states have strong interests in exercising their tort laws, recent cases such as *Goodyear*, *McIntyre*, *Bauman*, *Bristol-Myers Squibb*, and *Tyrrell* have interpreted jurisdiction in such a way that precludes the states from providing effective means of redressing those harms corporate defendants have caused to their citizens.<sup>77</sup> The Court has interpreted due process to be applied to each defendant's action individually so that each defendant's contacts with the forum must be purposeful if a state is to reach that defendant.<sup>78</sup> In recent cases, the Court failed to acknowledge that the Court's precedent

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<sup>72</sup> See *infra* text accompanying notes 63-64. In *International Shoe*, the corporation had only one unit that was at issue; however, this theory did not provide any solution for orb-web corporations.

<sup>73</sup> See *supra* text accompanying notes 56-67. Cf. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778 (majority opinion) (describing that the corporation does business in California by stating that "BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than \$900 million from those sales.").

<sup>74</sup> See YEAZELL, *supra* note 1, at 71.

<sup>75</sup> *Shaffer*, 433 U.S. at 216 (citing *Int'l Shoe*, 326 U.S. at 319). Cf. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (majority opinion) (describing that plaintiffs must be the forum state residents and must claim to have suffered harm in that forum. In short, some sort of causation is required).

<sup>76</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>77</sup> See *supra* Part I.A; see also discussion *infra* Parts II-IV.

<sup>78</sup> *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 n.13 (1984) (describing "jurisdiction over a parent corporation automatically establishes jurisdiction over a wholly owned subsidiary.").

cases involved a single corporate defendant, but have not involved an orb-web or a multinational corporation.<sup>79</sup> Thus, the current theory of fairness is vague at the best.

In addition, the U.S. Constitution gives each state the power to tax and open its courts to its citizens to sue corporations whose agents do business within its borders.<sup>80</sup> A tort claim generally occurs wherever an offending product or material is distributed or circulated.<sup>81</sup> Generally, due process does not intend to oust traditional tort law or liability for injuries, but it should be interpreted along with the federal rules, which are analogous to those traditionally imposed by state tort law.<sup>82</sup>

### 5. Interpretations of the Constitutional Requirements of the Due Process Clause by Different Authorities

Generally, “[s]tate courts are the primary guarantors of constitutional rights”<sup>83</sup> because state courts’ jurisdiction is determined by state legislatures and not by Congress.<sup>84</sup> In addition, Congress cannot lawfully force, either indirectly or directly, the Supreme Court to reverse a state court’s decision as long as the state court’s jurisdiction is consistent with the Constitution.<sup>85</sup>

Traditionally, states may constitutionally exercise power over individuals, partnerships, and unincorporated associations, which transact business or do certain acts within the states’ borders.<sup>86</sup> Likewise, the Full Faith and Credit Clause requires states to recognize another state’s judgment where the judgment is consistent with the Due Process Clause.<sup>87</sup> Thus, a judgment delivered by a state court is enforceable in other states and enforceable in the United States.

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<sup>79</sup> See *supra* Part I.C.

<sup>80</sup> *Int’l Shoe*, 326 U.S. at 324-25 (Black, J., dissenting)

<sup>81</sup> PETER HAY, *supra* note 12, at 81; see RESTATEMENT (SECOND) OF TORT § 577A (1977).

<sup>82</sup> See, e.g., *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

<sup>83</sup> H.M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (“The State courts, in the scheme of the Constitution, are the primary guarantors of constitutional rights, and in many cases, they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court’s appellate jurisdiction and been upheld in doing so, then we really would be sunk.” (international citation omitted)).

<sup>84</sup> See *Claflin v. Houseman*, 93 U.S. 130, 137 (1876) (stating that the federal government cannot interfere in State courts’ decisions except in three cases by exclusive authority over the subject, by simple grant of authority, or by a subsequent prohibition to the States).

<sup>85</sup> See *id.* at 138.

<sup>86</sup> See *Doherty & Co. v. Goodman*, 294 U.S. 623, 627 (1935) (stating that “A nonresident who gets all the benefit of the protection of the laws of this State with regard to the office or agency and the business so transacted ought to be amenable to the laws of the State as to transactions growing out of such business upon the same basis and conditions as govern residents of this State. ‘It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents.’”).

<sup>87</sup> U.S. CONST. art. IV, § 1; cf. *Hilton v. Guyot*, 159 U.S. 113 (1895) (describing that the Full Faith and Credit Clause does not apply to French corporations).

Nevertheless, the Court never interpreted these established provisions, but instead created new models and left many questions unanswered.

Additionally, under the Commerce Clause,<sup>88</sup> states cannot limit corporations from carrying out business in interstate commerce and cannot attach conditions so as to unduly burden interstate commerce, but reasonable taxation and reasonable regulations are permissible.<sup>89</sup> However, some have interpreted the Fifth Amendment as allowing the foreign defendant's contact with the United States as a whole rather than a particular forum.<sup>90</sup>

An emerging view is that an existence of national contacts presumptively, but not conclusively establishes jurisdiction under the Fourteenth Amendment.<sup>91</sup> However, federal courts provide a nationwide forum for a defendant through *forum non-conveniens*,<sup>92</sup> but state courts provide a nationwide forum through the Full Faith and Credit Clause.<sup>93</sup> Additionally, some federal statutes also allow both nationwide and worldwide service of process, thereby providing federal and state courts the same territorial reach without regard to states' boundaries.<sup>94</sup> Thus, the *minimum contacts model* has absolutely no practical and theoretical purpose for determining jurisdiction.

Even though we assume that the *minimum contacts model* is valid, it should be a defendant's burden to show that the chosen forum is sufficiently inconvenient and will be materially disadvantageous in the trial of the case.<sup>95</sup> However, the challenge presented is the distinction between the general jurisdiction and specific jurisdiction under the *minimum contacts model*. Professors Von Mehren and Trautman argued that

Jurisdictional rules customarily favored the defendant because, "at least when the parties enjoy[ed] relatively equal economic strength and social standing," the burden was on the plaintiff to change the "status quo" between the parties. Indeed, the traditional rule was that "*actor forum rei sequitur* (the plaintiff must pursue the defendant in his forum)." Accordingly, traditional bases of jurisdiction--"in personam," "quasi in rem," and "in rem"--predicated adjudicatory authority on the sovereign's physical power over the defendant or their property, expecting the

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<sup>88</sup> U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.").

<sup>89</sup> *Oregon Waste Sys. v. Dep't of Envtl. Quality of Oreson*, 511 U.S. 91, 108 (1994) (citation omitted); *see Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1 (1877).

<sup>90</sup> PETER HAY, *supra* note 12, at 119.

<sup>91</sup> *Id.*

<sup>92</sup> *See* 28 U.S.C. § 1397.

<sup>93</sup> *See infra* text accompanying notes 153-164.

<sup>94</sup> PETER HAY, *supra* note 12, at 118 (citing 15 U.S.C.A. § 22, which authorizes service on Clayton Act defendant "wherever [defendant] may be found"; 15 U.S.C.A. § 78aa (Section 27 of the 1934 Securities Act)).

<sup>95</sup> PETER HAY, *supra* note 12, at 119.

plaintiff to come to sue where one or the other could be found.<sup>96</sup>

The recent cases made it clear that there is no “relatively equal economic strength and social standing”<sup>97</sup> between individuals and orb-web corporations.<sup>98</sup> Arguably, due process remains a complex theory because neither the Fourteenth Amendment nor the Fifth Amendment clarified how due process can be satisfied for either out-of-state corporations or orb-web corporations, but the courts have evaluated case law with inconsistent dimensions and suggested several theories to assert jurisdiction.<sup>99</sup> Therefore, a re-routed approach of jurisdictional law is of prime importance.

### *B. Consequences of a Plaintiff's Forum Selection*

Before examining an orb-web corporation more closely, it is important to know how selection of a forum may influence or widen the jurisdictional gap. Assume that a selected forum is a plaintiff's domicile or the United States; the question is whether orb-web defendant corporation would be burdened to litigate in the selected forum.

As Justice Holmes has described it, “domicil[e] is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.”<sup>100</sup> Professor Lea Brilmayer has stated that “domicile of the parties to a suit would provide a forum convenient to them. Defendants, especially, would seem to benefit from a rule basing jurisdiction upon domicile.”<sup>101</sup> Although the theory of domicile does not necessarily mean it would be convenient to the plaintiff alone, it certainly provides one sure forum to sue a defendant.<sup>102</sup>

Typically, plaintiffs have the option to file a suit in any forum related to that suit when the plaintiff files with a court of the state where he or she is domiciled. However, a plaintiff's choice of forum requires substantial consideration of due process particularly when a foreign corporation is involved. Perhaps “a plaintiff has [a] conceivable opportunity to shop around for a forum

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<sup>96</sup> Harvard Law Association, *Personal Jurisdiction – General Jurisdiction – Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 316-17 (2014) (internal citation omitted) (stating that in general jurisdiction cases, the plaintiff needs to come to the defendant's place to sue while in specific jurisdiction cases, the defendant may come to him).

<sup>97</sup> See cases cited *supra* notes 4-6.

<sup>98</sup> *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) (“The majority chides respondents for conjuring a ‘parade of horrors,’ but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.” (citation omitted)).

<sup>99</sup> See, e.g., *Goodyear*, 564 U.S. 915 (describing defendants must be “essentially at home”); *McIntyre*, 564 U.S. 873 (describing that defendants contact must be purposeful); *Bauman*, 134 S. Ct. 746 (same as *Goodyear*); *BNSF R. Co.*, 137 S. Ct. 1549 (describing that the defendant's substantial and continuous contact is not enough).

<sup>100</sup> *Williamson v. Osenton*, 232 U.S. 619, 625 (1914); see Christopher T. Corson, *Reform of Domicile Law for Application to Transients, Temporary Residents and Multi-Based Persons*, 16 COLUM. J.L. & SOC. PROBS. 327 (1981).

<sup>101</sup> Brilmayer, *supra* note 22, at 730.

<sup>102</sup> *Id.* at 730-31.

because of geographical convenience and advantage of choice of law.”<sup>103</sup> It is also likely that a plaintiff’s chosen forum may not be convenient for the defendant.

If an alternative forum is in a foreign country, involving a foreign corporation, a plaintiff’s jurisdictional determination becomes even more complex. With respect to a foreign forum, it is likely inconvenient to an individual plaintiff, but the same may not be true to a foreign-corporate defendant. For example, in *Goodyear*, two boys from North Carolina died due to injuries sustained in a tragic bus accident in France.<sup>104</sup> The case could have been litigated in France.<sup>105</sup> However, the decedents were from North Carolina, so their parents returned to North Carolina for the burial and filed a case in a North Carolina State court against Goodyear USA and its subsidiaries.<sup>106</sup>

The trial court had to determine whether it would be reasonable to exercise jurisdiction over the Goodyear defendants in state courts or federal district courts located in North Carolina. The trial court concluded that the plaintiff’s forum selection would be appropriate although it is inconvenient to the foreign subsidiaries.<sup>107</sup> Perhaps an answer lies in Restatement of Conflict of Law § 29 that “[a] State has a power to exercise judicial jurisdiction over an individual who is domiciled in the State.”<sup>108</sup> However, the Supreme Court said that the state court could not assert jurisdiction over the foreign defendants when they were not “essentially at home.”<sup>109</sup> Thus, the Court’s language itself created a controversy.

On the other hand, the *Goodyear* plaintiffs might never have pursued their claims abroad, particularly because the case was emotionally-charged and the plaintiffs claimed substantial

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<sup>103</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981).

<sup>104</sup> *Goodyear*, 564 U.S. at 918.

<sup>105</sup> *See id.*

<sup>106</sup> *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76), 2010 WL 4628575, at \*120-127 (Joint Appendix). At the time of the accident, the driver of the bus was acting as an agent of Eric Meter, the French Soccer Network, the European Soccer Network, and NCYSA. The driver was a city bus driver, and he generally did not drive buses to the airport, was not familiar with the highways, and had never driven a bus along the route on which these events took place. When the bus reached the ramp on the intersection of highway, the driver engaged in a loud and animated conversation with the travel agent and became distracted. On entering upon the curve, the bus lost the control. The bus skidded sideways and hit a low, concrete separating wall then it over turned onto its left side while returning onto the roadway and slid until it came to rest by the side off the roadway in a field. The ramp on which the accident occurred was known to be a high accident area. Warning signs were posted in advance of the curve. The posted speed limit was 70 km per hour, but the evidence presented showed that the driver was driving 100 km per hour. Additionally, heavy rain fell shortly before, and it was falling at the time the bus approached the curve, substantially reducing the tires’ grip with the road. One of the children was sitting in the rear of the bus while the other was sitting in a front seat of the bus. The bus’s tires were defective and failed while the bus was travelling around the curve. The defective tires were manufactured by defendant Goodyear and its subsidiaries.

<sup>107</sup> *See Brown v. Meter*, 199 N.C. App. 50, 55 (2009), *aff’d*, 364 N.C. 128 (2010), *rev’d sub nom.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>108</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 29 (1971); PETER HAY, *supra* note 12, at 28, 53; DICEY & MORIS, CONFLICT OF LAWS 284-87 (13th ed. 2000).

<sup>109</sup> *Goodyear*, 564 U.S. at 919

damages.<sup>110</sup> The presumption of a chosen forum is “even stronger” when the plaintiff is an American citizen and an alternative forum is a foreign country such as France.<sup>111</sup> Also, the Tenth Amendment provides the “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.”<sup>112</sup>

The question, then, is whether private and public interest factors render a plaintiff’s choice of forum appropriate. In fact, “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”<sup>113</sup> In contrast, an important interest of the United States in providing a forum in consideration of a foreign defendant was articulated in *Iragorri v. United Technologies Corp.*,<sup>114</sup> which reasoned that

It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff’s home district. But the court must consider a plaintiff’s likely motivations in the light of all relevant indications...motivated by legitimate reasons, including the plaintiff’s convenience and the ability of the U.S. resident plaintiff to obtain jurisdiction over the foreign defendant, and diminishing deference to a plaintiff’s forum choice to the extent that it was motivated by tactical advantage.<sup>115</sup>

Similarly, if a non-citizen plaintiff files a case in the United States and if an alternative forum is a better forum than the plaintiff’s selected forum, then a court gives stronger preference to that alternative forum.<sup>116</sup> For example, in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, the plaintiffs were non-U.S. citizens, and the defendant corporation, Union Carbide India Limited (“UCIL”), was incorporated under Indian law but was a subsidiary of U.S. parent-corporation Union Carbide Corp., a New York corporation.<sup>117</sup>

In this case, the tragic industrial disaster occurred in Bhopal, India, where a highly toxic gas leaked from the plant in substantial quantities, killed more than 2100 people, injured over 200,000 people, killed livestock, damaged crops, and interrupted the city’s businesses.<sup>118</sup> Since the parent corporation was born in the United States, the Indian Government filed cases involving approximately 200,000 plaintiffs in the United States District Court for the Southern District of

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<sup>110</sup> See, e.g., D.W. Robertson, *The Federal Doctrine of Forum Non-Conveniens*, 29 TEX. INT’L L.J. 353 (1994)

<sup>111</sup> *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972).

<sup>112</sup> U.S. CONST. amend. X.

<sup>113</sup> *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72 (2d Cir. 2003) (citation omitted).

<sup>114</sup> *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001).

<sup>115</sup> *Id.* at 73.

<sup>116</sup> *In re Union Carbide Corp.*, 634 F. Supp. 842, 844-45 (S.D.N.Y. 1986).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*



New York.<sup>119</sup> The District Court held that India provided an adequate alternative forum for the litigation by stating that when a plaintiff is foreign, the plaintiff's choice of forum deserves less deference.<sup>120</sup>

Under established models, the Court recently said that the most fertile place to sue an orb-web corporation has been a neutral forum such as corporation's world headquarters or principal place of business.<sup>121</sup> If so, not only is the interest of judicial economy protected but also the plaintiff's case is much safer from being thrown out due to lack of personal jurisdiction. Furthermore, federal courts are courts of limited jurisdiction whereas state courts are courts of general jurisdiction.<sup>122</sup> The problem is that many U.S. plaintiffs do not have economic strength to go to a different state, where the orb-web corporation's headquarters is located, to sue a corporation for its wrongdoing.

Under the *minimum contacts model*, states' long-arm statutes and the Federal Rules of Civil Procedure have established a ground to sue such defendants in state courts.<sup>123</sup> As Justice Scalia once emphasized, "a plaintiff should simultaneously consider the 'subject matter' of the case, when selecting a forum, because administrative simplicity is a major virtue in a jurisdictional statute...[a] sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible."<sup>124</sup> It is true that a federal forum may not be an appropriate forum for an individual plaintiff when suing an orb-web-corporation.

For example, in *Goodyear*, the plaintiff filed a complaint and sent service of process under a Hague Convention, a federal treaty, to three Goodyear subsidiaries, asserting a North Carolina state court as a forum.<sup>125</sup> In *Goodyear*, the first problem arose when the alternative jurisdiction was a foreign nation even though the plaintiffs asserted a state-law cause of action--a wrongful death.<sup>126</sup> Second, Goodyear and its subsidiaries' origination, direction, control, and co-ordination were from the corporation's world headquarters, located in Akron, Ohio.<sup>127</sup> Goodyear's subsidiaries could have had a fair opportunity to be sued in Akron, which also meant that the plaintiff's choice of forum would not have been very fruitful.<sup>128</sup> Third, plaintiffs have included Goodyear's North Carolina subsidiary, a plant incorporated in North Carolina, which has a

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *infra* note 128 and accompanying text

<sup>122</sup> See *Houston v. Moore*, 5 Wheat. 1, 25-26 (1820) (recognizing a state court's jurisdiction).

<sup>123</sup> *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring).

<sup>124</sup> See *id.*

<sup>125</sup> See Joint Appendix, *supra* note 106, at 3-119.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *Hertz Corp. v. Friend*, 559 U.S. 77, 130 (2010) ("[T]he phrase 'principal place of business' refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities.").

principal place of business in New York.<sup>129</sup> In the light of these facts, the question arises whether the plaintiff could have intended Goodyear North Carolina as an agent of Goodyear USA. The plaintiffs could not sue in federal court, and the Court said that the plaintiff could not sue in the state court, which ultimately resulted in a wrong forum.

Under the established law, state courts are very inconsistent in analyzing personal jurisdiction.<sup>130</sup> Some courts consider factors, such as whether a plaintiff's forum choice is motivated by (a) the convenience of the plaintiff's residence in relation to the chosen forum, (b) the availability of witnesses or evidence to the forum district, (c) the defendant's amenability to suit in the forum district, (d) the availability of appropriate legal assistance, and (e) other reasons relating to convenience or expense.<sup>131</sup> Other courts consider whether a plaintiff's forum selection causes any harassment to the defendant, such as a tactical advantage resulting from local laws favoring the plaintiff's case, juries' habitual generosity in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the defendant's inconvenience and expenses resulting from litigation in that forum.<sup>132</sup>

In *World-Wide Volkswagen v. Woodson*,<sup>133</sup> the Court emphasized that a plaintiff may select a forum, in tort litigation where the harm takes place, even though it may be unreasonably burdensome to a non-resident defendant.<sup>134</sup> In this case, the plaintiffs, the Robinsons, were domiciled in New York.<sup>135</sup> Defendants Seaway and Worldwide were also citizens of New York.<sup>136</sup> The plaintiffs purchased from the defendants an Audi which exploded and severely injured the plaintiff's wife and their child while they were moving to their new domicile, Arizona.<sup>137</sup> The plaintiffs filed a case where the accident had occurred, a blue collar area outside Tulsa, Oklahoma.<sup>138</sup> Even though the burden on the defendants had been always a primary concern, the Court considered other factors, including

The forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest was not adequately protected by the plaintiff's power to choose the forum; the interstate

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<sup>129</sup> See *Goodyear*, 564 U.S. at 918.

<sup>130</sup> See *supra* note 46 and accompanying text

<sup>131</sup> *Norex Petroleum Ltd. v. Access Indus. Inc.* 416 F.3d 146, 153 (2nd Cir. 2005) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 443, 507 (1947), *cert denied sub nom.*, *Tyumen Oil Comp. v. Norex Petroleum Ltd.*, 547 U.S. 1175 (2006)).

<sup>132</sup> See, e.g., *Iragorri*, 274 F.3d at 72.

<sup>133</sup> *World-Wide Volkswagen*, 444 U.S. at 286.

<sup>134</sup> *Id.* at 292.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies (internal citation omitted).<sup>139</sup>

Often, a plaintiff's careful selection of a forum results in winning or losing a case if the selected forum satisfies the Due Process Clause. Like the plaintiffs' forum selection in *World-Wide Volkswagen*, in *Daimler AG v. Bauman*,<sup>140</sup> the plaintiff's forum selection was appropriate, but the plaintiff was not given an opportunity in the United States, even though the plaintiffs satisfied many of the "other factors" offered in *World-Wide Volkswagen*.<sup>141</sup>

In *Bauman*, Argentinian employees' estates ("plaintiffs") filed a suit in the United States District Court for the Northern District of California alleging that MB Argentina collaborated with Argentinian State security forces and kidnapped, detained, tortured, and killed its employees and their relatives under the military dictatorship during Argentina's "dirty war."<sup>142</sup> Plaintiffs sued in the United States under the Alien Tort Statute, 28 U.S.C. § 1350, the Torture Victim Protection Act of 1991, and under the laws of California and Argentina.<sup>143</sup> They claimed that Daimler Mercedes Benz's subsidiary, Mercedes Benz Argentina ("MBA"), unlawfully violated civil rights in collaboration with Argentinian authorities.<sup>144</sup>

Under these facts, it is unreasonable to expect these plaintiffs would have received a fair hearing or an opportunity to be heard in their country. MBA was a subsidiary wholly owned by Daimler's predecessor in interest.<sup>145</sup> Plaintiffs filed a case in federal court in California because Daimler had a subsidiary in California, MBUSA, which served as Daimler's exclusive importer and distributor in the United States.<sup>146</sup> MBUSA purchases Mercedes-Benz automobiles from

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<sup>139</sup> See *World-Wide Volkswagen*, 444 U.S. at 292; See Tapio Puurunen, *The Judicial Jurisdiction of States Over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty*, U.C. DAVIS J. INT'L L. & POL'Y 133, 199 (2002) (describing protecting consumer and State interests under the minimum contacts and reasonableness test).

<sup>140</sup> *Bauman*, 134 S. Ct. 746 (2014).

<sup>141</sup> *World-Wide Volkswagen*, 444 U.S. at 292. Stating that other factors include the

[b]urden on defendant, [which] while always primary concern in determining jurisdiction of a nonresident defendant, will in appropriate case be considered in light of other relevant factors, including interest of forum state in adjudicating disputes, plaintiff's interest in obtaining convenient and effective relief, at least when such interest is not adequately protected by plaintiff's power to choose the forum, interstate judicial system's interest in obtaining most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental, substantive social policies. (internal citation omitted).

<sup>142</sup> *Bauman*, 134 S. Ct. at 751-52.

<sup>143</sup> See 28 U.S.C. § 1350 (2006) ("by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

<sup>144</sup> *Bauman*, 134 S. Ct. at 752.

<sup>145</sup> *Id.*

<sup>146</sup> See *id.* at 751

Daimler in Germany, then imports these vehicles, and ultimately distributes them to independent dealerships located throughout the U.S.<sup>147</sup> Although MBUSA's principal place of business is in New Jersey and incorporated in Delaware, it has multiple California-based facilities, including a regional office in Costa Mesa, a vehicle preparation center in Carson, and a classic center in Irvine.<sup>148</sup> MBUSA is the largest supplier of luxury vehicles in the California market, including over 10% of all sales of new vehicles, which accounts for 2.4% of Daimler's worldwide sales.<sup>149</sup> Under these facts, it is hard to accept that the plaintiffs' forum selection was not correct.

Additionally, the Court also noted that at the time of the lawsuit, Daimler-Chrysler North America was holding a corporation, which wholly owned MBUSA.<sup>150</sup> After a lawsuit was filed, MBUSA signed an agreement with Daimler AG under which MBUSA was recognized as an "independent contractor" of Daimler, and that MBUSA was not a general or special agent, or partner, or joint venture, or an employee of Daimler.<sup>151</sup>

Nevertheless, the Supreme Court held that the plaintiffs could not assert jurisdiction in California.<sup>152</sup> The Court relied on the contractual terms and did not recognize the constitutional provisions that granted jurisdiction to federal district courts.<sup>153</sup> Although the federal statute granted jurisdiction based on claims "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"<sup>154</sup> Daimler was a German company, and the agreement between Daimler and MBUSA prevented the Court from asserting jurisdiction.<sup>155</sup>

As noted, the parties entered contract after the case was filed even though it is generally not accepted practice under the law. It is well established that the doors of Justice are open to everyone regardless of race, religion, or nationality. If so, why was the plaintiffs' forum selection in *Bauman* incorrect?

In deciding cases like Daimler and many other orb-web corporations, the Court presented no resolution to the disputes against those injured individuals. In short, the plaintiffs in *Bauman* ended-up, once again, in a wrong forum.

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

Perhaps the strongest string in this analysis are the recent cases such as *Bristol-Myers Squibb Co.*,<sup>156</sup> and *Tyrrell*.<sup>157</sup> A typical case of forum selection by the plaintiff is *Bristol-Myers Squibb Co.*<sup>158</sup> There, a group of plaintiffs filed a case in California state court against the corporate defendant Bristol-Myers Squibb (“BMS”), a pharmaceutical company.<sup>159</sup> The Court noted that only 86 plaintiffs were California residents and another 592 plaintiffs were not California residents.<sup>160</sup> These plaintiffs filed a case asserting various state law based claims for health injuries caused by the defendant’s pharmaceutical drug.<sup>161</sup> Although BMS was incorporated in Delaware and had a principal place of business in New York, it maintained substantial operations in New York, New Jersey, and California.<sup>162</sup> In California, BMS has five research and laboratory facilities and employs around 164 employees and 250 sales representatives.<sup>163</sup> The Court nevertheless advised that out-of-state plaintiffs may join with in-state plaintiffs “in a consolidated action in the states that have general jurisdiction over” the corporate defendant.<sup>164</sup> However, the Court also said that “the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States.”<sup>165</sup> What the Court perceives from BMS is that although plaintiffs are free to make their forum selection in theory, in practice, plaintiffs’ forum selection is limited because to win over forum selection—the corporate defendant must be “essentially at home.”<sup>166</sup>

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<sup>156</sup> *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1549; see also BMS.COM, <https://www.bms.com/about-us/our-company/worldwide-facilities.html> (last visited August 2017).

<sup>157</sup> See *id.* (“We are a global biopharmaceutical company focused on helping to address the unmet medical needs of patients with serious diseases. In 2016, we invested \$4.9 billion in R&D, which included the discovery and development of new medicines”).

<sup>158</sup> *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1773.

<sup>159</sup> *Id.* at 1778, 1779.

<sup>160</sup> *Id.* at 1777.

<sup>161</sup> *Id.* at 1783.

<sup>162</sup> *Id.* at 1777-78.

<sup>163</sup> *Id.* at 1773, 1778; *Plavix Prod. & Mktg. Cases*, No. JCCP4748, 2013 WL 6150251, at \*2 (Cal. Super. Ct. Sept. 23, 2013). One of BMS’s offices, in Milpitas California, is owned by BMS, and the remainder are leased. The Milpitas facility is used primarily for research and employs 85 people. Three other offices are primarily used as research and laboratory facilities.

<sup>164</sup> *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1777-78.

<sup>165</sup> *Id.* at 1783.

<sup>166</sup> See *id.* at 1781.

The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly

Likewise, in *Tyrrell*, the BNSF, a railroad defendant, had over 2,000 miles of railroad track and employed more than 2,000 workers in the forum state.<sup>167</sup> In that case, the Court, relying on precedent cases, said that the Fourteenth Amendment Due Process Clause did not permit a state to hale an out-of-state corporation before its courts when the corporation is not “at home” in the state and the episode-in-suit occurred elsewhere.<sup>168</sup> In *Tyrrell*, plaintiff Robert Nelson, a North Dakota resident, brought a Federal Employers Liability Act (“FELA”) suit against BNSF in a Montana state court to recover damages for knee injuries he allegedly sustained while working for BNSF as a fuel-truck driver.<sup>169</sup> Another plaintiff, Kelli Tyrrell, appointed in South Dakota as the administrator of her husband Brent Tyrrell’s estate, similarly sued BNSF under FELA in the same forum state court.<sup>170</sup> Plaintiff Tyrrell’s widow alleged that the deceased plaintiff developed a fatal kidney cancer from his exposure to carcinogenic chemicals while working for BNSF.<sup>171</sup> The Court focused on the fact that neither plaintiff alleged injuries arising from or related to work

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sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.

<sup>167</sup> See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017); see also BNSF, UNITED STATES SECURITY EXCHANGE COMMISSION REPORT 1-51, <http://www.bnsf.com/about-bnsf/financial-information/pdf/10k-llc-2016.pdf>.

Burlington Northern Santa Fe, LLC (BNSF or the Company) is a holding company that conducts no operating activities and owns no significant assets other than through its interests in its subsidiaries. BNSF’s principal, wholly-owned subsidiary is BNSF Railway Company (BNSF Railway), which operates one of the largest railroad networks in North America. BNSF Railway operates approximately 32,500 route miles of track (excluding multiple main tracks, yard tracks and sidings) in 28 states and also operates in three Canadian provinces. Through one operating transportation services segment, BNSF Railway transports a wide range of products and commodities including the transportation of Consumer Products, Industrial Products, Agricultural Products, and Coal, derived from manufacturing, agricultural and natural resource industries, which constituted 35 percent, 25 percent, 22 percent, and 18 percent, respectively, of total freight revenues for the year ended December 31, 2016. These Consolidated Financial Statements include BNSF, BNSF Railway and other majority-owned subsidiaries, all of which are separate legal entities. *Id.* at 1.

Burlington Northern Santa Fe Corporation was incorporated in the State of Delaware on December 16, 1994. On February 12, 2010, Berkshire Hathaway Inc., a Delaware corporation (Berkshire), acquired 100% of the outstanding shares of Burlington Northern Santa Fe Corporation common stock that it did not already own. The acquisition was completed through the merger (Merger) of a Berkshire wholly-owned merger subsidiary and Burlington Northern Santa Fe Corporation with the surviving entity renamed Burlington Northern Santa Fe, LLC. Berkshire’s cost of acquiring BNSF was pushed-down to establish a new accounting basis for BNSF beginning as of February 13, 2010. Earnings per share data is not presented because BNSF has only one holder of its membership interests. *Id.*

<sup>168</sup> *BNSF Ry. Co.*, 137 S. Ct. at 1553.

<sup>169</sup> *Id.* at 1554 (citation omitted).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

performed in the forum state and deceased plaintiff Tyrrell never worked for BNSF in the forum state.<sup>172</sup> Thus, it is clear that not only plaintiffs must be forum state residents, but also defendants must be forum residents as well.

It is clear that the light shed on “forum selection” by the plaintiff in these cases can be seen only if each case is examined based on its own facts. The Court’s “heightened standard” to sue continued in these series of cases. This is to say that it is almost impossible for U.S. plaintiffs to sue even in their own states or foreign states unless both plaintiffs and defendants are “essentially at home.”

### *C. Introduction of Orb-Web-Corporations*

With undertaking an exhaustive review of plaintiffs’ forum selection and its consequences as traced from the recent cases, it seems proper to say that the legal contents and structure of orb-web corporations and its application thereof in a factual framework in jurisdictional analysis is anything but clear in the future cases. The development of “no forum” for a U.S. plaintiff prompts observation of crucial differences among small corporations, multinational corporations, and orb-web corporations.

Small corporations are those discussed in *International Shoe*. Multinational corporations have been described by one scholar: “[i]f one borrows from the business literature a working definition of a multinational enterprise [“MNE”] as ‘a cluster of corporations of diverse nationalit[ies] joined together by ties of common ownership and responsive to a common management strategy,’ one sees that the present legal framework has no comfortable, tidy receptacle for such an institution.”<sup>173</sup> This scholar said, “[t]he law recognizes as ‘international corporations’ only those entities which are constructed by international law, that is, by treaty.”<sup>174</sup> Thus far, the only representatives of the category are a small number of intergovernmental joint ventures, largely between nations of the European Economic Community (“EEC”).<sup>175</sup> Additionally, multinational corporations may not be in the form of a parent-subsidary relationship.

Orb-web corporations, on the other hand, are much larger corporations than multinational corporations. These corporations expand and organize their businesses by establishing subsidiary corporations in the form of a spider web.<sup>176</sup> Generally, an orb-web corporation is born from a parent (or an “orb”) corporation, and it expands vertically and horizontally into subsidiaries (forming a “web”).<sup>177</sup> Each subsidiary then vertically incorporates in another state (and country or

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<sup>172</sup> See *id.* at 1558.

<sup>173</sup> Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740 (1970).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *infra* diagram 1.

<sup>177</sup> See Andersson, Ulf, *Subsidiary Network Embeddedness: Integration, Control and Influence in the Multinational Corporation* (Jan. 24, 1997) (unpublished Ph.D. dissertation, Acta Universitatis Upsaliensis) (on file at <http://uu.diva.portal.org/smash/record>) (stating that under the legal system, subsidiaries may under corporate

continent), expands its business in different countries, and may further affiliate with other corporations and spread over an entire continent. However, only subsidiary corporations of the parent are part of web. Even though other affiliates merely support (or do business with) the subsidiaries for their spare parts and necessary by-products, with the subsidiaries, they are independent companies and carry their own identity. The relationship between these subsidiaries and the affiliates are often contractual, and they are not in the web, even though these affiliates rely on the web (or subsidiaries).

Moreover, some of the subsidiaries horizontally incorporate and connect with other subsidiaries of the orb corporation. This article calls these horizontal subsidiaries headquarters, which are incorporated in such a way that they tie the entire web with the parent (or orb) corporation. Also, these horizontal headquarters are directly connected with the parent corporation to expand the parent corporation's business and mission. Often, the board of directors and higher officials of an orb-web corporation are the same for the orb and the headquarters even though these headquarters are in different countries or continents.<sup>178</sup>

These vertical subsidiary corporations disseminate in such a way to (i) address local markets; (ii) minimize liability and protect assets; (iii) reduce cost of production by utilizing local labor force, expertise, and resources; (iv) reduce transportation expenses; (v) match local market demands and shape the production accordingly; (vi) conduct and maintain administrative work effectively; (vii) create a monopoly by spreading the parent's trademark and its product; (viii) sell over productions for higher profits; (ix) maximize overall net profits of the parent corporation; and (x) avoid paying taxes.<sup>179</sup> Thus, the strong interconnections between subsidiaries, headquarters, and the orb form a giant web. The entire web plays an important role in carrying a mission of the orb. In the web, each subsidiary makes its own contribution to the orb. In recent decisions,<sup>180</sup> the Court overlooked that each subsidiary corporation of the orb was not a separate and distinct entity but an integral part of the whole orb-web corporation.<sup>181</sup>

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embeddedness maintain relationship with sister subsidiaries, which affects the multinational corporation's behavior in general).

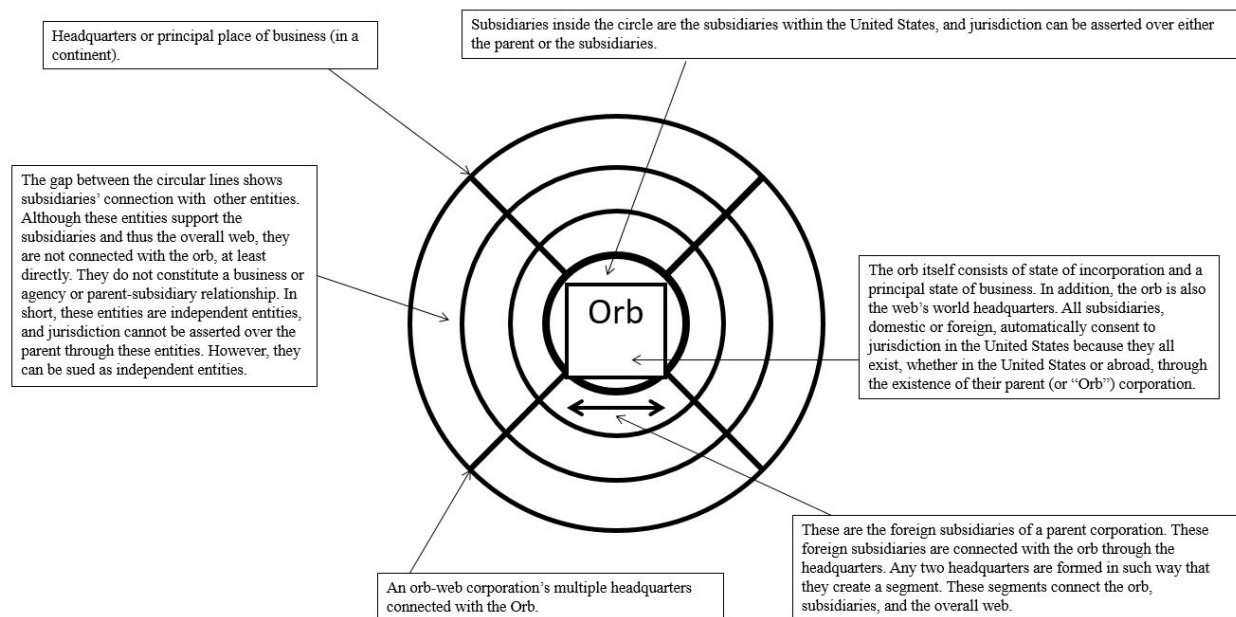
<sup>178</sup> See *infra* diagram 1.

<sup>179</sup> See, e.g., Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589 (1975); Shyam Soni, *Essay on the Meaning and Definition of Multinational Corporation*, PRESERVEARTICLES.COM, <http://www.preservearticles.com/2012010319696/essay-on-the-meaning-and-definitio-of-multinational-company.html> (last visited Aug. 30, 2017); *Parent Companies and Their Subsidiaries in the European Union*, EUROPEAN COMMISSION TAXATION AND CUSTOMS UNION, [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/parents-subsidiary\\_directive/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/parents-subsidiary_directive/index_en.htm) (showing the general behavior of the parent and subsidiary relationship); Tim Dickinson, *The Biggest Tax Scam Ever*, ROLLING STONE (Aug. 27, 2014), <http://www.rollingstone.com/politics/news/the-biggest-tax-scam-ever-20140827> (stating that "Some of the America's top corporations are parking profits overseas and ducking hundreds of billions in taxes. And how's Congress responding? It's rewarding them for ripping us off").

<sup>180</sup> See cases cited *supra* notes 4-6.

<sup>181</sup> Kevin B. Barefoot, *U.S. Multinational Companies: Operations of U.S. Parents and Their Foreign Affiliates in 2010*, BUREAU OF ECONOMIC ANALYSIS (Nov. 2012), <http://www.bea.gov/scb/pdf/2012/11%20November/1112MNCs.pdf> (stating that a U.S. MNC comprises a U.S. parent company and its foreign affiliates, presented by the "Annual Survey of U.S. Direct Investment Abroad conducted by the Bureau of Economic Analysis (BEA)").





#### D. Problems with the Established Models in an Orb-Web Corporation's Setting

As the diagram above indicates, orb-web corporations are structurally different from the structure of the corporation involved in *International Shoe*. Hence, an application of the established models in jurisdictional analysis of an orb-web corporation presents a grave legitimacy and constitutionality problem.<sup>182</sup> Obviously, this unequal bargaining power between individuals and orb-web corporations often favors and benefits corporations only.<sup>183</sup> Despite courts' noble intention to provide the maximum deference to out-of-state defendants, current jurisdictional models are one-sided and biased. To overcome grave unconstitutionality and injustice, this Article proposes three rerouted approaches that are consistent with the Court's objectives.

This article proposes that the Constitution, through the Full Faith and Credit Clause, allows a judgment rendered in a state court to be enforced in sister state courts and thus permits nationwide jurisdiction.<sup>184</sup> In drafting the Full Faith and Credit Clause, the framers of the Constitution were motivated by a desire to unify the U.S. as one nation while preserving the autonomy and independency of a dual system of government.<sup>185</sup> To that end, they sought to guarantee that

<sup>182</sup> See *supra* Part.I.A.1-2.

<sup>183</sup> U.S. CONST. art IV, § 1.

<sup>184</sup> See Brilmayer, *supra* note 22, at 732 ("The power rationale, therefore, results in unavoidable circularity: a State has power and thus jurisdiction over an absent defendant domiciliary only if sister States will enforce the judgment, which sister States will do only if the first State had jurisdiction."); see also 28 U.S.C. § 1738 ("State preclusion rules should control the matters that originally litigated in that State").

<sup>185</sup> *Milwaukee Cnty. v. M. E. White Co.*, 296 U.S. 268 (1935).

judgments rendered by the courts of one state would not be ignored by the courts of other states.<sup>186</sup> In *Milwaukee County v. M. E. White Co.*,<sup>187</sup> the Court clearly said

Article 4, s 1, not only commands that “full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State” but it adds “Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” And Congress has exercised this power, by Act of May 26, 1790, c. 11, 28 U.S.C. s 687, 28 USCA s 687, which provides the manner of proof of judgments of one State in the courts of another, and specifically directs that judgments “shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”<sup>188</sup>

In addition, the Constitution has granted additional power to exercise personal jurisdiction over a foreign defendant only if legislatures have authorized the courts by: (1) statutory authorization to states through states’ long-arm statutes; and (2) Federal Rule of Civil Procedure.<sup>189</sup> Long-arm statutes authorize states to exercise their jurisdiction to the full extent allowed under the Due Process Clause.<sup>190</sup> State long-arm statutes fall within a notion of “law of the nation” because the law of the nation does not prevent a state from exercising jurisdiction over its citizens whether they are travelling or residing abroad or residing in the state.<sup>191</sup>

It is clear from the framers’ intent that the constitutional provision convincingly shows that the state courts can assert general jurisdiction over [an orb-web corporation] under the *presence model*.<sup>192</sup> However, the *minimum contacts model* serves no appropriate function even though the Court recognized it as a constitutional mandate.<sup>193</sup> Hence, the sketch of the objective provides that whether a corporation is present, in one state or another, it does not make any significant difference in asserting jurisdiction if the first court has personal jurisdiction.<sup>194</sup>

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<sup>186</sup> *Id.* at 273.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> BORN RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 81-83 (5th ed. 2011) [hereinafter RUTLEDGE].

<sup>190</sup> *Id.*

<sup>191</sup> U.S. CONST. amend. X (stating that “[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

<sup>192</sup> See *infra* Parts II., III.

<sup>193</sup> *Id.*; *Goodyear*, 564 U.S. at 927-28 (“A corporation’s ‘continuous activity of some sort within a State,’” *International Shoe* instructed, “‘is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” Our 1952 decision in *Perkins* remains “[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum” (citation omitted)).

<sup>194</sup> See sources cited *supra* note 4-8, 76.

Assume for a moment that all foreign subsidiaries were separate and distinct entities as the Court viewed them in *Goodyear*, and the constitutional guarantee and the framers' intent were ignored completely.<sup>195</sup> The fundamental concern with personal jurisdiction models is that they stem from the Court's decisions in two pre-industrial era cases.<sup>196</sup> However, recently it became the prerogative of practitioners to embrace business law, corporate law, international law, comparative law, product liability law, conflict of law, and economic models when determining substantial and systematic contacts to establish personal jurisdiction over such orb-web corporations.<sup>197</sup> Thus, our established jurisprudential philosophies do not provide any platform for the United States' plaintiffs to sue such orb-web corporations.

The Court's articulation of the *minimum contacts model* became more prominent and raised concerns in recent cases that warrant a changed approach: (1) *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>198</sup> (2) *Daimler AG v. Bauman*,<sup>199</sup> (3) *J. McIntyre Machinery, Ltd. v. Nicaastro*,<sup>200</sup> (4) *BNSF R. CO. v. Tyrrell*,<sup>201</sup> and (5) *Bristol-Myers Squibb Co. v. Superior Court of Cal. San Francisco Cty.*<sup>202</sup> In these cases, the Court completely overlooked the distinction between the factual situations in *Pennoyer* and *International Shoe* and that in *Goodyear*, *McIntyre*, *Bauman*, and *Bristol-Myers Squibb*. As noted, our specific and general jurisdiction tests, under the *minimum contacts model*, are circular, and failed to accommodate jurisdictional sphere over orb-web corporate defendants.<sup>203</sup> Since the Court ignored the distinction, these principal cases have signaled a serious need for a re-routed approach in personal jurisdiction analysis.<sup>204</sup>

Another concern with the established models is that they are misguiding to lower state courts and directed often towards an unfortunate outcome. For example, in *Goodyear*, the North Carolina Trial Court concluded general jurisdiction over Goodyear's foreign subsidiaries based on

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<sup>195</sup> *Goodyear*, 564 U.S. at 929 (stating that “[m]easured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction”); *See also infra* Parts II., III.

<sup>196</sup> *See supra* Part I.A.1-2.; *McIntyre*, 564 U.S. at 887 (Bayer J., concurring) (stating that the “Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that ‘[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade.’ ...there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents” (citation omitted)).

<sup>197</sup> *See supra* Part I.A.C.

<sup>198</sup> *Goodyear*, 564 U.S. 915.

<sup>199</sup> *Bauman*, 134 S. Ct. 746.

<sup>200</sup> *McIntyre*, 564 U.S. 873

<sup>201</sup> *BNSF Ry. Co.*, 137 S. Ct. 1549.

<sup>202</sup> *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773.

<sup>203</sup> *See supra* Part I.A.1.

<sup>204</sup> *See supra* Part I.A.

affidavits and evidence presented.<sup>205</sup> This case presented two problems. First, the state courts followed the state laws.<sup>206</sup> Second, the state courts followed established models of jurisdiction.<sup>207</sup> For example, in *Goodyear*, the trial court used the term “quality of the defendant’s contacts, which include systematic and repeated contacts with the state of North Carolina for the purpose of commerce along with the defendants’ ownership by U.S. corporations doing substantial business in North Carolina, weighs in favor of finding general jurisdiction over the defendants.”<sup>208</sup> The appellate court concluded that a state court might assert personal jurisdiction without altering or departing from the essential character or a function of the Due Process Clause of the Fourteenth (or Fifth) Amendment.<sup>209</sup> Despite the adequacy of the lower courts’ reasoning, the Court said that the North Carolina State courts do not have jurisdiction based on the established models. It is apparent that the lower courts followed an *indirect approach* to assert jurisdiction.<sup>210</sup>

The Due Process Clause never mentioned the *minimum contacts model*.<sup>211</sup> To be sure, the Court states that all assertions of a state-court jurisdiction must be evaluated per the standards set forth in *International Shoe* and its progeny.<sup>212</sup> Nevertheless, this phrase is too ambiguous to sustain the conclusion that the framers and Congress intended to measure due process through the *minimum contacts model*. The text of the Fourteenth Amendment as well as that of the pre-*Pennoyer* cases contains no reference to the term “minimum contacts.”<sup>213</sup>

In the years since *International Shoe* was decided, a survey of cases reflects that the states’ courts often follow their own precedents under long arm statutes, which doubtlessly receive little or no attention,<sup>214</sup> during the United States Supreme Court’s appellate review. If a foreign

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<sup>205</sup> *Brown v. Meter*, No. 05 CVS 1922, 2008 WL 8187601, at \*1-3 (N.C. Super. Ct. Apr. 25, 2008), *aff’d*, *Brown v. Meter*, 199 N.C. App. 50, 55 (2009), *aff’d*, 364 N.C. 128 (2010), *rev’d sub nom.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>206</sup> *See, e.g.*, N.C. GEN. STAT. §1-74.4(1)(d); *Meter*, 199 N.C. App. 50 (citing *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281 (1986)); *Long v. Long*, 157 N.C. App. 703 (2003); *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41 (1983); *Nicastro v. McIntyre Mech. Am. Ltd.*, 399 N.J. Super. 539 (App. Div. 2008) (citing *Wilson v. Paradise Vill*, 395 N.J. Super. 520 (App. Div. 2007)).

<sup>207</sup> *See, e.g.*, U.S. CONST. amend. XIV; *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1979); *McGee v. Int’l Life Ins. Co.* 355 U.S. 220 (1957); *Int’l Shoe v. Washington*, 326 U.S. 310 (1945).

<sup>208</sup> *Meter*, 199 N.C. Ct. App. at 57.

<sup>209</sup> *Id.*

<sup>210</sup> *See supra* text accompanying note 27.

<sup>211</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *Int’l Shoe*, 326 U.S. 310 (1945).

<sup>212</sup> *Shaffer*, 433 U.S. at 212 (footnote omitted).

<sup>213</sup> U.S. CONST. amend. XIV, § 1, 2.

<sup>214</sup> *See, e.g.*, *Meter*, 199 N.C. App. at 57-58 (citation omitted) (“Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial

corporation (or a foreign-born, orb-web corporation) incorporates a subsidiary in the United States and if the foreign parent still owns the trademark, then the subsidiary cannot get a trademark in the United States.<sup>215</sup> Likewise, the same is true for a U.S.-born orb-web corporation's foreign subsidiaries.<sup>216</sup> Therefore, it is clear that the parent and subsidiaries are explicitly connected with each other.

Consequently, this Article examines the policies underlying due process to determine its proper application in orb-web corporations. Since *Pennoyer* and *International Shoe*, many personal jurisdiction cases filed in state courts resulted in wasting the state judiciary's time and resources, as they did not demonstrate comity or federalism at all.<sup>217</sup> Nevertheless, plaintiffs wish to file a case against orb-web corporations in state courts even though the Court already has predetermined a no jurisdiction rule.<sup>218</sup> Because our existing jurisdictional laws did not precisely define when the amount of controversy does not meet the threshold limit to assert federal diversity jurisdiction, a plaintiff has no recourse except to file the case in state courts.<sup>219</sup>

## II. GENERAL JURISDICTION UNDER THE PRESENCE MODEL: U.S. BORN, ORB-WEB CORPORATIONS

### A. Presence: A Citizenship Theory

Theoretically, citizenship of an individual is determined by where the person is domiciled and intends to remain indefinitely.<sup>220</sup> On the other hand, determination of a corporation's

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court typically evaluates in determining whether the required level of contacts exists: (1) quantity of the contacts between the defendant and the forum State, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum State, and (5) convenience of the parties.”).

<sup>215</sup> See *infra* note 178 and accompanying text.

<sup>216</sup> *Kmart Corp. v. Cartler, Inc.*, 486 U.S. 281, 287-88 (1988) (“...prohibits importing into the United States any merchandise of foreign manufacture if such merchandise bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, ...unless written consent of the owner of such trademark is produced at the time of making entry” (citing 19 U.S.C. § 1526(a)).

<sup>217</sup> *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 71 (1996) (“a new theory of State sovereign immunity, the dissent develops its own vision of the political system created by the Framers, concluding with the Statement that ‘[t]he Framers’ principal objectives in rejecting English theories of unitary sovereign...would have been impeded if a new concept of sovereign immunity had taken its place in federal-question cases, and would have been substantially thwarted if that new immunity had been held untouchable by any congressional effort to abrogate it.”).

<sup>218</sup> *McIntyre*, 564 U.S. at 890 (Breyer, J., concurring) (“The plurality seems to State strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’ But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary who then receives and fulfills the orders?” (international citation omitted)).

<sup>219</sup> 28 U.S.C. § 1332 (a). § 1332 has an amount in controversy requirement of \$75,000. In *Goodyear*, the plaintiff only sued for \$10,000. Thus, it is likely that the plaintiff did not meet the amount in controversy.

<sup>220</sup> See *Sun Printing & Publ’g Ass’n v. Edwards*, 194 U.S. 377, 383 (1904) (describing that a natural person must be citizen of the United States); U.S. CONST. Amend. XIV, § 1; *Williamson v. Osenton*, 232 U.S. 619, 624 (1914) (describing that a natural person must be a domiciliary of a State).

citizenship serves two purposes: (1) it shows a corporation's affiliation with the state for choice of law, and (2) it helps to determine forum selection for orb-web or multinational corporations.<sup>221</sup> "A corporation created by a State, ...[is] capable of being treated as a citizen of that state, as much as a natural person."<sup>222</sup>

However, corporations are generally domiciled or "at home" in at least two places: (1) their state of incorporation, and (2) their principal place of business.<sup>223</sup> Our courts, however, recognized only two places where a corporation can be at home.<sup>224</sup> Recently, the Court added that "the exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that State."<sup>225</sup>

Additionally, courts failed to provide a proper analysis for a corporation's state of incorporation under the presence model. The law under which it is organized determines a capacity of a corporation to sue or to be sued.<sup>226</sup> Accordingly, domiciles of orb-web corporations are distinct and separate from domiciles of individuals or single-domestic corporations.<sup>227</sup>

Focusing on the rationale of state of incorporation, it would certainly be fair to sue the U.S.-born parent corporation (or an orb-web corporation) in the United States, the country whose law is responsible for a birth of entire orb-web-construction: parent and its affiliated subsidiaries. Additionally, when a corporation is present in the United States through incorporation, it can never violate the Due Process Clause to defend a lawsuit in its home (or a lawsuit arising on a different continent). Because the Fourteenth Amendment says, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>228</sup> Thus, the law suggests that all U.S.-born orb-web corporations may have multiple citizenships rather than just dual citizenships.

Some courts have repeatedly held that to assert jurisdiction over a non-resident defendant, a complaint must include allegations of both the state of incorporation and the principal place of business.<sup>229</sup> A common law principle supports this thesis further: When a parent corporation is

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<sup>221</sup> See *supra* text accompanying notes 172-180.

<sup>222</sup> Cf. *Louisville, C. & C.R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844).

<sup>223</sup> See *Hertz Corp.*, 559 U.S. at 130.

<sup>224</sup> See *id.*

<sup>225</sup> *BSNF Ry. Co.*, 137 S. Ct. at 1558 (citing *Daimler*, 134 S. Ct. at 761, n.19).

<sup>226</sup> See FED. R. CIV. P. 17(b).

<sup>227</sup> See generally A. Pillet, *Jurisdictions in Actions Between Foreigners*, 18 HARV. L. REV. 325 (1905) (describing whether our courts treat the foreigners or the associations as subject on principle to the same rules of jurisdiction as natural persons); see Mary Twitchell, *A Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 633 (1988) (stating that with respect to a corporation, the place of incorporation and principal place of business are bases for general jurisdiction).

<sup>228</sup> U.S. CONST. art XIV, § 1.

<sup>229</sup> See, e.g., *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970) (faulting plaintiffs' failure to affirmatively allege State of incorporation); 5 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1208 n. 12 (3d ed. 2004) (listing cases requiring pleading of both State or States of incorporation

incorporated in a forum state, the state court can assert general *in personam* jurisdiction for a cause of action occurring anywhere in the United States (or in the world).<sup>230</sup> However, the courts have never addressed the question: which states of incorporations and which principal places of businesses should be considered when determining the citizenship?<sup>231</sup> To that end, the Court treats each state of incorporation as a separate corporation under established state business laws.<sup>232</sup> But the orb, as a parent corporation, is responsible for the blooming of the entire web corporations.

As noted, the Court treats civil cases differently than environmental cases. In environmental cases, the Court has established that “any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution...regardless of whether that person is the facility’s owner [or] the owner’s parent corporation.”<sup>233</sup> It is clear that in environmental cases, our courts do not mind whether the parent corporation is located in the United States or not because Congress has enacted the statute to address the issue.<sup>234</sup>

In civil cases, however, the Court follows “separate and distinct” principles. Like in environmental cases, in tort cases, an orb-web-parent corporation certainly satisfies citizenship language. In addition, courts have an authority to exercise jurisdiction if it possesses statutory authorization derived from a federal statute, 15 U.S.C. § 22, or from a state statute of general application.<sup>235</sup> Thus, a state’s long arm statute may furnish a mechanism for obtaining jurisdiction in both federal as well as state courts.<sup>236</sup> Furthermore, Rule 4(k)(2) authorizes the exercise of personal jurisdiction in both federal question and diversity jurisdiction cases to the limits of due process.<sup>237</sup>

Assume that the orb-web-parent corporation is distinct and separate from its subsidiaries, which not only violates many ethical stand points under *quid pro quo* terms, but also certainly

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and location of principal place of business).

<sup>230</sup> See *Pennoyer*, 95 U.S. at 723.

<sup>231</sup> See, e.g., *Perkins*, 342 U.S. at 447-448 (stating that the company had only one headquarter and principal place of business).

<sup>232</sup> *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (stating that rights and obligations of corporations should be governed by State laws).

<sup>233</sup> *United States v. Bestfoods*, 524 U.S. 51, 65 (1998) (internal citation omitted).

<sup>234</sup> See *id.*

<sup>235</sup> *United States v. Swiss Am. Bank Ltd.*, 191 F.3d 30, 36 (1st Cir. 1999) (“A court need not even consider them unless it possesses statutory authorization to exercise specific personal jurisdiction over defendants of the type that the plaintiff targets. This authorization may derive from a federal statute, see, e.g., 15 U.S.C. § 22 (providing for worldwide service of process on certain corporate antitrust defendants), or from a State statute of general application.... A State long-arm statute furnishes a mechanism for obtaining personal jurisdiction in federal as well as State court.”).

<sup>236</sup> Cf. *Omni Capitol Int’l v. Rudol Wolf & Co.*, 484 U.S. 97, 106 (1987) (stating that “[s]ection 22, however, is silent as to service of process,” and it would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention.).

<sup>237</sup> See FED. R. CIV. P. 4(k).

conflicts with most states' long-arm statutes and federal rules on long arm statute granting nationwide jurisdiction to sue an orb-web corporation born in the United States.<sup>238</sup>

# 1. An Orb-Web Corporation's Multiple States of Incorporation: Which State of Incorporation Should Be Considered as "Essentially at Home"?

Generally, an orb-web corporation has more than one (a) principal place of business, (b) State of incorporation, (c) headquarters, and (d) subsidiary.<sup>239</sup> Among all these recent cases, *Goodyear* presents a good example of [parent] corporations' orb in the United States because the "essentially at home" devil disembarked from *Goodyear*. In *Goodyear*, the issue raised was whether foreign subsidiaries of the United States based parent corporation were amenable to suit in state courts on claims unrelated to any activity of the subsidiaries in a forum state?<sup>240</sup> The plaintiffs were administrators of two youth soccer players from North Carolina. Both players were killed in France while travelling in a bus to the airport and on their way to North Carolina.<sup>241</sup> At that time, one of the defective tires, separated from it plies; the bus pulled off the roadway, and flipped over.<sup>242</sup> Both youths' administrators filed an action in a North Carolina trial court against the Meter North Carolina soccer team, French soccer team, Goodyear Lastikeri T.A.S, Goodyear Luxembourg Tires SA, Goodyear Dunlop Tires France SA, Goodyear Tire & Rubber Company, USA (Goodyear), and its affiliated branches.<sup>243</sup>

The foreign defendants (subsidiaries) were Goodyear USA's subsidiaries.<sup>244</sup> Goodyear USA<sup>245</sup> contended that the ties between the Goodyear Tire and Rubber Company and Goodyear France, Goodyear Luxembourg, and Goodyear Turkey, respectively were indirect.<sup>246</sup> The

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<sup>238</sup> See *supra* text accompanying notes 181-193.

<sup>239</sup> See *supra* diagram I.

<sup>240</sup> *Goodyear*, 564 U.S. 915.

<sup>241</sup> *Id.*

<sup>242</sup> See *id.*

<sup>243</sup> Brown, *supra* note 164, at 1-3 (indicating that the plaintiff properly served the defendants Goodyear Turkey, Goodyear France and Goodyear Luxembourg); see The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, The Hague Convention Art. 1, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

<sup>244</sup> *Meter*, *supra* note 204, 199 N.C. App. at 55; see Global Presence, GOODYEAR CORPORATE, <http://www.goodyear.com/corporate/about/facilities.html> (last visited Aug. 30, 2017) (stating that Goodyear subsidiaries has a principle place of business in Akron, OH. Goodyear had plants in North Carolina, and regularly engaged in commercial activity there. Goodyear claims that as a global corporate citizen, Goodyear takes its responsibility seriously.).

<sup>245</sup> See Richard J. Kramer, GOODYEAR CORPORATE, <http://www.goodyear.com/corporate/bios/kramer.html> (stating that Rich Kramer is Chairman, President and Chief Executive Officer of the Goodyear Tire & Rubber Company. He has been Chairman since October 1, 2010 and President and Chief Executive Officer since April 13, 2010. He has been a member of Goodyear's Board of Directors since February 23, 2010.).

<sup>246</sup> *Meter*, *supra* note 204, 199 N.C. App. at 54, n.4. According to Mr. Kramer's deposition, sales &



defendants argued that the Goodyear Turkey Regional Plant manufactured the defective tire that was exclusive to that region.<sup>247</sup> Nevertheless, the record showed that Goodyear owned 100% of Goodyear operations stocks.<sup>248</sup> Goodyear's global enterprise has deep and longstanding roots in North Carolina, registered to do business in North Carolina since 1956, and maintained, owned, and operated three large tire and tire mold manufacturing plants in North Carolina.<sup>249</sup> Furthermore, the record revealed that once a request to supply products was made through the Goodyear enterprise, and products were produced, whether the plant was located in Turkey or in North Carolina, and delivered through a distribution process handled through three channels--original equipment, replacement, or export.<sup>250</sup>

Goodyear subsidiaries were incorporated in many States in the United States and expanded into six continents, but Goodyear and its subsidiaries' origination, direction, control, and coordination were from the corporation's orb, located in Ohio. Hence, the Goodyear subsidiaries could have a fair opportunity to be sued in Ohio.<sup>251</sup> Turning to the question of State of incorporation, Goodyear North Carolina was incorporated in North Carolina, but had its principal place of business in New York.<sup>252</sup> Like Goodyear USA, all Goodyear branches (subsidiaries) are incorporated and have a principal place of business in at least two States (countries or continents): (a) where they are incorporated; (b) where they have principal places of business; and

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marketing offices that develop business plans, sales plans, and determine how the needs associated with those plans would be met. Goodyear's sales marketing office would decide how to obtain from a European affiliate. After making this determination, the needed tires would be manufactured, shipped to the United States, and distributed to retailers and similar entities using Goodyear's existing distribution system. Moreover, Mr. Kramer made clear that the defendants do not send tires into the United States for distribution, but Goodyear makes that determination in this country. Furthermore, Kramer Stated that these tires are not sold in the United States regularly, but the modified versions were imported in 2006 when a strike closed the American plant that ordinarily produced them. Goodyear needed to import these tires into NC because Goodyear did "not have a source here. Kramer also said that the manufacturers did not have their own distribution system for the sale of their tires, but instead used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and to NC.

<sup>247</sup> See Brown, *supra* note 106, at 1-2 (describing that defendant Goodyear [Turkey] is a wholly owned subsidiary of Goodyear. However, the plaintiff's pleading states that Goodyear [Turkey] is a Turkish corporation with its principal place of business in Turkey).

<sup>248</sup> See Brief for Respondents at 8, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76), 2010 WL 5125441, at \*4.

<sup>249</sup> Brief for Respondents at 5, *supra* note 204, at 2 ("Goodyear's global enterprise has deep and long-standing roots in North Carolina. Goodyear has been registered to do business there since 1956 and maintains a registered agent in Raleigh. It also owns and operates three large tire and tire-mold manufacturing plants in Fayetteville, Statesville, and Asheboro, North Carolina" (citing Dep't of the Secretary of State, N.C., *available at* <http://www.secretary.State.nc.us/corporations/Corp.aspx?PitemId=5030445> [listing for "Goodyear Tire & Rubber Company"])).

<sup>250</sup> Brief for Respondents at 9, *supra* note 204, at 6 (stating that Mr. Kramer admitted that tires manufactured at Goodyear Luxembourg's plant had also been requested, brought into, and sold by Goodyear Luxembourg through the Goodyear enterprise in NC for use on cement mixers, waste haulers, and front-end loaders).

<sup>251</sup> See *Goodyear*, 564 U.S. at 918.

<sup>252</sup> See *id.*

(c) their permanent identity, at their orb, in Ohio.<sup>253</sup> Even though the orb-web subsidiaries generally operate away from home, the parent and subsidiaries are connected with each other horizontally, vertically, and centrally with the orb-web parent corporation. Therefore, the subsidiaries would not exist independently.

As the Court held, the corporation is present in its home or principle place of business where the corporate activities are continuous and systematic.<sup>254</sup> Due Process requires that an out-of-State defendant can be sued if the lawsuit does not offend “traditional notions of fair play and substantial justice.”<sup>255</sup> “Fair play and substantial justice” allows a U.S. plaintiff to sue a U.S.-based orb-web parent, which deliberately controls its corporate form in order to secure its advantages; it would be inequitable to shield the liabilities raised by naming its subsidiaries as non-resident-corporate defendants.<sup>256</sup>

Another great example presented in a very recent case, Bristol-Myers Squibb Co. Bristol-Myers Squibb is a fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York.<sup>257</sup> The company employs 25,000 worldwide and generates 15 billion.<sup>258</sup> The California Supreme Court noted that Bristol-Myers Squibb “d[id] not contest that its marketing, promotion, and distribution of Plavix was nationwide and was associated with California-based sales representatives.”<sup>259</sup> Additionally, BMS had a contract with McKesson Corporation, co-defendant in this case. McKesson is headquartered in San Francisco.<sup>260</sup>

The Court said that although BMS engaged in business activities in California and sold Plavix there, “BMS did not develop, create a marketing strategy for, manufacture, label, package,

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<sup>253</sup> See *SEC Charges Goodyear With FCPA Violations*, U.S. Securities and Exchange Commission (Feb. 24, 2015), <http://www.sec.gov/news/pressrelease/2015-38.html>.

<sup>254</sup> See, e.g., *Int’l Shoe*, 326 U.S. at 317 (describing that International Shoe involved State forum court); *Goodyear*, 564 U.S. at 924 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” (citing *Brilmayer*, *supra* note 20, at 728 (identifying domicile, place of incorporation, and principal place of business as “paradig[m]” bases for the exercise of general jurisdiction))); *Shaffer*, 433 U.S. at 212 (stating that the rationales of the *Pennoyer* and *Harris* decisions are inconsistent with this standard, they are overruled, but when asserting jurisdiction over a corporation in a State court, the court must follow the test set forth in *International Shoe*).

<sup>255</sup> See *Int’l Shoe*, 326 U.S. at 316.

<sup>256</sup> *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 813-16 (1948) (stating that a foreign parent could be “found” in the United States because of its “constant supervisions and intervention” in the activities of its U.S. subsidiaries going well “beyond normal exercise of shareholder’s rights.”); *Goodyear*, 564 U.S. at 930 (stating that the plaintiffs failed to identify the defendants’ “discrete status as subsidiaries and treatment of all Goodyear entities as a ‘unitary business,’ so that jurisdiction over the parent would draw in the subsidiaries as well”).

<sup>257</sup> *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (stating that the Court noted the facts that the company advertised and distributed nationwide).

<sup>258</sup> See *id.* at 1773, 1778, 1781.

<sup>259</sup> *Id.* at 1779, 1781

<sup>260</sup> See *id.*

or work on the regulatory approval for Plavix in the State.”<sup>261</sup> Additionally, “the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.”<sup>262</sup> This was a new requirement added by the Court. The dissenting Justice said,

it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are “at home,” and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not “at home” in any State.<sup>263</sup>

*International Shoe* only suggests that a subsidiary located in the United States can be sued to assert jurisdiction over its parent corporation (and its other affiliated branches or units).<sup>264</sup> Thus, the courts can fairly ask in return for general jurisdiction of the State courts (or federal courts in appropriate circumstances, if proper diversity is established).<sup>265</sup> However, in recent cases, the Court recognized that the subsidiaries are distinct corporate entities even though they are not separate from the orb at all.<sup>266</sup> In one way or another, these subsidiaries or branches get many benefits from the parent corporation--substantially, systematically, and continuously.<sup>267</sup>

## 2. An Orb-Web Corporation’s Principal Places of Business: Which Principal Place of Business Should Be Considered as a “*Perkins* Textbook Case”?

Like the State of incorporation, a principal place of business also presents a critical challenge to lower courts and practitioners because the Court has never clarified which principal place of business should be focused on to determine an orb-web corporation’s actual business activities for jurisdictional purposes. For example, in *Goodyear*, the Court held that *Perkins v. Benguet Consolidated Mining Co.*<sup>268</sup> remains the textbook case for general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.<sup>269</sup> The Court said that unlike the defendant in *Perkins*, whose sole wartime business activity was

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<sup>261</sup> *See id.*

<sup>262</sup> *Id.* at 1789 (Sotomayor, J., dissenting)

<sup>263</sup> *Id.* at 1789 (Sotomayor, J., dissenting).

<sup>264</sup> *See supra* Part I.A.2-3.

<sup>265</sup> *See supra* text and accompanying notes 19-29

<sup>266</sup> *See supra* text and accompanying note 178.

<sup>267</sup> *See Helicopteros*, 466 U.S. at 414, n.9.

<sup>268</sup> *Goodyear*, 564 U.S. at 928 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

<sup>269</sup> *See id.* (internal citation omitted).

conducted in Ohio, the Goodyear subsidiaries are in no sense at home in North Carolina.<sup>270</sup> The Court in *Goodyear* said that Goodyear subsidiaries lacked the kind of continuous and systematic general business contacts necessary to allow North Carolina to entertain a suit against them unrelated to anything that connects them to the State.<sup>271</sup>

In *Perkins*, the foreign defendant, Benguet Consolidated Mining Co., operated gold and silver mines in the Philippines, and ceased its operation during World War II.<sup>272</sup> The mining company's president returned to his Ohio hometown and maintained an office, conducted business for the corporation, kept corporate records, deposited company funds in an Ohio bank, designated the Ohio bank as a transfer agent for the corporation's stock, paid his own salary and the salaries of two Ohio-based secretaries, and organized directors' meetings at his home office in Ohio without registering to do business in Ohio.<sup>273</sup> As general manager, he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and dispatched funds to cover purchases for corporate rehabilitation from his Ohio office.<sup>274</sup> He carried on a continuous and systematic supervision of the necessarily limited wartime activities of the company by discharging his duties as president and general manager.<sup>275</sup> Although the company did not have any mining properties in Ohio, the company directed many of its wartime activities from Ohio at the time he was served with summons.<sup>276</sup>

In *Perkins*, the Court said that the Ohio court had ultimate power to determine jurisdiction over the foreign corporation because the foreign corporation's president "ha[d] been carrying on a continuous and systematic, but limited, part of its general business from Ohio," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just."<sup>277</sup> The Court also concluded that the foreign corporation's activities in Ohio made the Ohio office as the corporation's "principal place of business."<sup>278</sup>

However, the Court in *Goodyear* failed to see, among other things, that World War II influenced the *Perkins* decision and subsequent cases would not be decided in the same circumstances. First, the magnitude of corporate activities in *Perkins* was significantly trivial compared to the magnitude of activities in *Goodyear*.<sup>279</sup> Second, *Perkins* only provided a black

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<sup>270</sup> See *id.* at 921.

<sup>271</sup> *Id.*

<sup>272</sup> *Perkins*, 342 U.S. at 445-46.

<sup>273</sup> *Id.* at 415.

<sup>274</sup> *Id.* at 415-16.

<sup>275</sup> *Id.* at 447-48.

<sup>276</sup> *Id.* at 448.

<sup>277</sup> *Id.* at 448; See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (internal quotation marks omitted).

<sup>278</sup> *Id.* at 447-48.

<sup>279</sup> See *supra* text accompanying notes 271-77.

line rule for one place of incorporation, only one place of business, the corporation's principal place of business. In addition, in *Perkins*, the defendant corporation did not have any other place of business compared to today's extremely complex global corporate web such as Goodyear and its subsidiaries. Third, in *Perkins*, Ohio was the company's tentative place of business while the company was still recouping its activities in Philippines. On the other hand, many Goodyear subsidiaries are incorporated and doing business in the United States and abroad, having world headquarters in the United States and at least three other headquarters on three different continents.<sup>280</sup>

The factual situation in *Perkins* is akin to a small-rural-town vendor operating a store (X) and keeping the store goods in his house or warehouse, both within the town (Y). For example, the vendor expands his business by opening another store in town (X1), or a neighboring town (or a neighboring State, country, or continent) and earns profits, makes purchases, pays rents and salaries, but operates and oversees it through one of his relatives, family members or a third person, and pockets the profits? Can the store in town X1 (or the State, or the country, or the continent) be "at home" in town X (or the State or the country or the continent)? As you see from this simple hypothetical, it is not possible. But both stores share the same owner. However, this information can only be proved by extensive discovery.

What if the same vendor starts the same type of store, with his name, in another State (X1)? Can X1 be "at home" in the first State? Under the principle stated in *Goodyear*, store X1 may satisfy the *minimum contacts model*, but more likely, it cannot satisfy the "at home" test because store X1 is not in the forum State (X). In *Perkins*, the defendant could satisfy the "at home" test because he operated in the same town as illustrated in the hypothetical and did not have the parent-subsidiaries bond that orb-web corporations share.

As in *Perkins*, if a corporation's headquarters and executive offices are in the same State in which it does most of its business, it would be the corporation's principal place of business.<sup>281</sup> Many companies' corporate headquarters, including executive offices, are in one State or country, while the corporation's plants or other centers of business activity are located in other States or countries.<sup>282</sup> The factual situations presented in *Goodyear* and *Perkins* show that the "at home" test should not be raised in case of orb-web corporations, which are webbed out in multiple principal places of business and multiple States of incorporation. So far, the courts have addressed a corporation's principal place of business or State of incorporation for jurisdictional purpose.<sup>283</sup> However, the Court has never addressed which headquarters is the principal place of business because there is no precedent established on this point until today.

One court concluded that a corporation's principal office rather than a factory, mill, or mine...constitutes the principal place of business.<sup>284</sup> Another court found that "principal place of

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<sup>280</sup> See *infra* note 389 and accompanying text.

<sup>281</sup> See, e.g., *Long v. Silver*, 248 F.3d 309, 314–315 (4th Cir. 2001); *Pinnacle Consultants, Ltd. v. Leucadia Nat'l. Corp.*, 101 F.3d 900, 906–907 (2d Cir. 1996).

<sup>282</sup> See, e.g., *Topp v. Comp Air Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); 15 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 102–112.1 (3d ed. 2009).

<sup>283</sup> See *supra* text and accompanying note 127.

<sup>284</sup> See *Burdick v. Dillon*, 144 F. 737, 738 (1st Cir. 1906).

business” refers to the place where a corporation’s officers actually direct, control, and coordinate the corporation’s activities, the place where the corporation maintains its headquarters and which is not simply an office where the corporation holds its board meetings.<sup>285</sup>

As a textual matter, the Court did not address which principal place of business should be considered when there are many. In addition, how do the “at home” and the substantial, systematic, and continuous contacts tests merge? The “at home” analysis requires courts to follow the *minimum contacts model* while the substantial, systematic, and continuous contacts test requires courts to follow the *presence model*. Looking closely at both models, the *minimum contacts model* is used as an *alternative approach* to determine jurisdiction, but the *presence model* provides a *direct approach* to assert jurisdiction. In short, these vivid approaches adapted by the courts illustrate that courts are neither settled on an approach nor suggest any likelihood of settling in the future if they continue to follow the established precedents.

### 3. “Substantial, Systematic, and Continuous Contacts”: *Helicopteros Nacionales de Colombia, S.A. v. Hall*

Recently, in *Goodyear*, the Court also followed *Helicopteros Nacionales de Colombia, S.A. v. Hall* as a twin case of *Perkins*.<sup>286</sup> In *Helicopteros*, a wrongful death claim was initiated, in the Texas State court against a Colombian corporation having its principal place of business in Columbia.<sup>287</sup> This issue commenced from a helicopter crash in Columbia.<sup>288</sup> The defendant made trips to Texas, purchased approximately four million dollars or 80% of the defendant’s fleet and related items, and paid approximately five million dollars, within seven years of its business relationship with Helicol.<sup>289</sup> The State court concluded that Helicol’s purchase of over four million dollars’ worth of equipment and regular training of pilots constituted sufficient contacts.<sup>290</sup> But the Court held that the contacts were not substantial, systematic, and continuous general business contacts like the defendant’s contacts in *Perkins*; therefore, the forum court could not assert jurisdiction.<sup>291</sup> Nowhere in the opinion, however, did the Court address what “substantial, systematic, and continuous” meant, but said that a four million dollars’ worth of business was not substantial.<sup>292</sup>

Some courts have developed a relative approach to determine what is substantial,

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<sup>285</sup> *Hertz Corp.*, 559 U.S. at 92; *Wisconsin Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (Weinfeld, J., dissenting).

<sup>286</sup> *Helicopteros*, 446 U.S. 408 (1984)

<sup>287</sup> *Id.* at 416.

<sup>288</sup> *Id.* at 409-10.

<sup>289</sup> *See id.* at 411.

<sup>290</sup> *Id.* at 416.

<sup>291</sup> *See id.* at 416, 418

<sup>292</sup> *See id.* at 408-418.

systematic, and continuous contacts under *Helicopteros*, which gave birth to the relative approach theory.<sup>293</sup> Both *International Shoe* and *Helicopteros* were decided under the *minimum contacts model*; therefore, this relative approach is irrelevant in establishing the “at home” test.<sup>294</sup> Because one of impediments to using the *minimum contacts model* is the distinction between the general and specific jurisdiction, the model must be abandoned.<sup>295</sup> While *Helicopteros* and *Perkins* may arguably have presented an interesting illustration of the substantial, systematic, and continuous contacts test, both cases were distinct and limited to specific context.<sup>296</sup> Hence, these cases do not support State courts’ jurisdiction under the citizenship theory.<sup>297</sup>

#### 4. Relative Approach Theories

There are, at least, three approaches developed under the relative approach theories.<sup>298</sup> The first theory is the place of operation theory, in which a corporation’s physical presence in different States such as corporation’s multiple centers of manufacturing, purchasing, or sales can be presumed as a principal place of business.<sup>299</sup> Obviously, it undermines its applicability in an orb-web corporation because a corporation might divide its production facilities and principal places of businesses into segments.<sup>300</sup>

For example, in *Goodyear*, Goodyear USA owned 52 production facilities, in 22 countries, with approximately 62,000 employees, which operated in four segments, covering a worldwide operation.<sup>301</sup> In addition, each segment had a headquarter and State of incorporation.<sup>302</sup> Each Goodyear subsidiary has at least two States of incorporation (one in Ohio and one in another country or continent) and at least two principal places of businesses. Goodyear USA also maintains executive and administrative functions in those respective States or nations. But in Ohio, it has a

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<sup>293</sup> See *infra* Part II. A. 4.

<sup>294</sup> See *supra* discussion Part II.A.1-2.; see *infra* discussion Part II.A.5.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> See *Peace v. Peck*, 18 How. 595, 599 (1856).

<sup>298</sup> *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998).

<sup>299</sup> See, e.g., *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990) (tangible property, production activities, purchasing, sales); *Topp v. Comp. Air, Inc.*, 814 F.2d 830, 834 n.3 (1st Cir. 1987) (factories, warehouses, sales offices); *Grimm v. Plasma Processing Corp.*, 888 F. Supp. 56, 58 (S.D. W. Va. 1995) (“corporate activities test focuses on the location of the corporation’s tangible assets”).

<sup>300</sup> See *infra* note 389 and accompanying text.

<sup>301</sup> See *Our Company*, GOODYEAR CORPORATE, <http://www.goodyear.com/corporate/about/glance.html> (last visited August 30, 2017)

<sup>302</sup> See *id.* (“Goodyear is one of the world’s largest tire companies, with operations in most regions of the world. Together with its subsidiaries and joint ventures, Goodyear develops, markets and sells tires for most applications.”)

principal place of business as well its birth place, i.e., principal State of incorporation.<sup>303</sup> Thus, Goodyear USA, as an entire orb-web corporation, has multiple principal places of businesses and multiple State-of-incorporations, a scenario not supported by our existing precedents.

The second theory is the “nerve center test” established in *Hertz Corp. v. Friend*.<sup>304</sup> In *Hertz*, the Court standardized the “nerve-center test” to determine a corporation’s principal place of business, but did not answer when a corporation has many principal places of businesses and when a plaintiff can assert jurisdiction in the State courts.<sup>305</sup> Thus, the nerve-center test is not supportive because *Hertz* involved the federal forum. In addition, if a corporation is winged out in an orb-web form, it is difficult for a U.S. plaintiff to bring a case in federal forum under diversity jurisdiction for a U.S.-based orb-web corporation.

The third theory is the far-flung theory as developed by a prominent Judge Edward Weinfeld who articulated that

where a corporation is engaged in far-flung and varied activities, which are carried on in different States, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control, and coordinate all activities without regard to locale, in the furtherance of the corporate

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<sup>303</sup> See *Corporate Responsibility*, GOODYEAR CORPORATE, <http://www.goodyear.com/responsibility/introduction-company-profile.html> (last visited Aug. 30, 2017).

Looking back, the founding of The Goodyear Tire & Rubber Company in 1898 seems especially remarkable, for the beginning was anything but auspicious. The 38-year-old founder, Frank A. Seiberling, purchased the company’s first plant with a \$3,500 down payment--using money he borrowed from a brother-in-law Lucius C. Miles. The rubber and cotton that were the lifeblood of the industry had to be transported from halfway around the world, to a landlocked town that had only limited rail transportation. Even the man the company’s name memorialized, Charles Goodyear, had died penniless 30 years earlier despite his discovery of vulcanization after a long and courageous search.... Even the depression of 1893 was beginning to fade. So on August 29, 1898, Goodyear was incorporated with a capital stock of \$100,000.... But it was the dynamic and visionary founder, hard-driving Seiberling, who chose the name and determined the distinctive trademark. *Id.*

See also *Managing Risk*, GOODYEAR CORPORATE <http://www.goodyear.com/responsibility/people-managing-risk.html?1#eliminating-risk> (last visited Aug. 30, 2017). (describing that Goodyear is one of the world’s leading tire companies, with operations in most regions of the world. Together with its U.S. and international subsidiaries and joint ventures, Goodyear develops, manufactures, markets and distributes tires for most applications. It also manufactures and markets rubber-related chemicals for various applications. Goodyear is one of the world’s largest operators of commercial truck service and tire retreading centers. In addition, it operates approximately 1,400 tire and auto service center outlets where it offers its products for retail sale and provides automotive repair and other services. Goodyear manufactures its products in 52 facilities in 22 countries. It has marketing operations in almost every country around the world).

<sup>304</sup> See *Hertz Corp.*, 559 U.S. at 96.

<sup>305</sup> See *id.* (“It is the place that Courts of Appeals have called the corporation’s ‘nerve center.’ And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion”).



objective.<sup>306</sup>

This theory may be relevant in an orb-web corporation's settings, but the court limited its analysis to United States based corporations.

##### 5. The Incorrect Mixture Rule: A Merger of the Presence and Minimum Contacts Models

Courts and litigators should seize an opportunity to clear the jurisprudential cloud in this area because neither State nor federal courts have made it clear in which situations they can exercise jurisdiction over an out-of-State corporation based on the presence of subsidiary corporations within the United States.<sup>307</sup> Under the current approach, presence and State of incorporation are determined upon the minimum contacts with a State, but this approach looked only at the magnitude of activities (the relative approach theory).<sup>308</sup>

As noted, this test may be relevant for an orb-web corporation, but it is limited to one principal place of business. For example, in *High Ridge Park Assoc. v. NYCOM Information Serv. Inc.*,<sup>309</sup> NYCOM, the defendant, was an operator and provider of a long-distance telephone service having 240 employees, all of whom were in Florida.<sup>310</sup> The senior officers and directors of the company, however, were in Connecticut.<sup>311</sup> The *High Ridge* Court held that Connecticut was the principal place of business because the Stamford Connecticut office was responsible for running the daily operations of NYCOM, as well as formulating the overall business strategy.<sup>312</sup> The Stamford office was responsible for press releases, management decisions, hiring personnel, legal and regulatory work, answering shareholder and investor inquiries and requests, and overseeing [the subsidiaries'] operations.<sup>313</sup> In *High Ridge*, there were only 240 employees, so it is easy to keep them all in one town (or city); but the same is not true in the case of Goodyear or other U.S. based orb-web corporations.

Earlier, in *Perkins*, the "substantial business contacts" involved only three-employees and

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<sup>306</sup> *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (Weinfeld, J., dissenting).

<sup>307</sup> See, e.g., Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports With Due Process*, 96 CAL. L. REV. 731, 744 (2008); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (stating that retaining direct-mail marketing and sales training companies in California insufficient to create general jurisdiction); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) (indicating that hiring of independent sales promotion representatives and consultants does not create general jurisdiction).

<sup>308</sup> Professor Cercone, *supra* note 20.

<sup>309</sup> *High Ridge Park Assoc. v. NYCOM Information Serv. Inc.*, 821 F. Supp. 835 (D. Conn. 1993).

<sup>310</sup> See *id.* at 838.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

corporate activities at the corporation's one and only place of business.<sup>314</sup> However, in *Helicopteros*, four million dollars' worth of business transactions were not substantial.<sup>315</sup> Likewise, in *Goodyear*, sending approximately 45,000 tires over three years to a sister subsidiary in North Carolina was not substantial.<sup>316</sup> In *International Shoe*, the Court upheld significant presence over a non-consenting corporation when only eleven of its employees were engaged in corporate activities.<sup>317</sup> In *Consolidated Textile Corp.*, the Court specifically held that in-State sales of an absent corporation's products did not establish the necessary "presence"--even when the wholly owned subsidiaries made sales in the forum.<sup>318</sup> Indeed, the facts in *Goodyear* were even more compelling, even though, in *Consolidated Textile Corp.*, the defendant directly caused the sales in the forum as such in Goodyear's subsidiaries, but in *Goodyear*, the Court approached this argument from the other direction.

The relative approach theory causes the lower State courts to fall into the trap of analyzing both specific and general jurisdiction.<sup>319</sup> For example, in *Goodyear*, the Court said

Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes. Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through "the stream of commerce"; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations.<sup>320</sup>

The North Carolina trial court did not confuse itself with the mixture rule under the *presence* and *minimum contacts models* as the Court claimed. As a matter of fact, first, the North Carolina State court examined the statutory authorization to sue the so-called "foreign defendants" under the "state's long arm statute" that the Court has set as a requirement to determine whether the defendants had minimum contacts with North Carolina.<sup>321</sup> Under the *minimum contacts model*, the North Carolina Court was bound to determine whether the case fell within the specific or

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<sup>314</sup> See *supra* text and accompanying notes 271-277.

<sup>315</sup> *Helicopteros*, 446 U.S. at 411-12.

<sup>316</sup> *Goodyear*, 564 U.S. at 921; Brown, *supra* note 106, at 1-3.

<sup>317</sup> See *supra* text accompanying notes 55-64.

<sup>318</sup> See *Consol. Textile Corp. v. Gregory*, 289 U.S. 85, 88 (1933).

<sup>319</sup> See *supra* note 46 and accompanying text.

<sup>320</sup> *Goodyear*, 564 U.S. at 921.

<sup>321</sup> *Meter*, *supra* note 204, at 57 (stating that due process considerations established in *Int'l Shoe* prohibits our States courts from exercising general jurisdiction unless the defendant has had certain minimum contacts with the forum State).

general jurisdiction depending upon the number of contacts.<sup>322</sup> Thus, establishing jurisdiction under the *minimum contacts model* is not only challenging, but requires proper determination of general or specific jurisdiction, which hinges on the application of the *minimum contacts model*.

For example, In *Tyrrell*, the Court said that BNSF was not incorporated in Montana and did not maintain its principal place of business there.<sup>323</sup> Nor was BNSF so heavily engaged in activity in Montana “as to render [it] essentially at home” in that State.<sup>324</sup> However, the Court noted that BNSF had over 2,000 miles of railroad track and more than 2,000 employees in Montana,” but shifted the focus, stating that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts.”<sup>325</sup> Furthermore, the Court said that “the inquiry ‘calls for an appraisal of a corporation’s activities in their entirety’; ‘[a] corporation that operates in many places can scarcely be deemed at home in all of them.’”<sup>326</sup> The Court reasoned that the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana.<sup>327</sup> However, the Court confused the holdings in *Daimler* and *Goodyear*, because these precedents did not allow “the assertion of general jurisdiction over claims like Nelson’s and Tyrrell’s that are unrelated to any activity occurring in Montana.”<sup>328</sup> On the other hand, Justice Sotomayer opined that

the majority’s approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.<sup>329</sup>

This article suggests that an orb-web corporation’s world headquarters satisfies both the State of incorporation and principal place of business to adjudicate any case that arises out of such contacts with a U.S.-based parent corporation because “minimum contacts” automatically satisfies in such case. In addition, these orb-web corporations can also be sued in any States in which it has

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<sup>322</sup> *Id.* at 58 (stating that the dispute is not related to, nor arises from Defendant’s contacts with North Carolina, so it is a specific jurisdiction case).

<sup>323</sup> *Tyrrell*, 137 S. Ct. at 1559 (majority opinion)

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (internal citation omitted).

<sup>329</sup> *Id.*, at 1560 (Sotomayer, J., dissenting).

subsidiaries or business offices in the United States under Rule 4(k)(1)(A).<sup>330</sup> Although there is no simple formula to provide an answer to the principal place of business inquiry, the Court's established rules cannot be aligned consistently across the board in all cases.<sup>331</sup> Thus, re-routing is needed with the existing laws.<sup>332</sup>

### *B. Presence: A Parent-Subsidiary Relationship Theory*

Under the traditional theory, an assertion of jurisdiction over the owner of the property suggests presence because *Pennoyer* rested on the premise that a proceeding “against” property is a proceeding against the owners of that property unless service of process is not proper.<sup>333</sup> In orb-web corporation cases, a question arises whether jurisdiction can be asserted over a parent corporation or subsidiary if the parent or subsidiary does business or is registered to do business in the forum State.

Under the agency theory, a parent corporation is constructively present through the subsidiary to such degree that it would be fundamentally fair to hail the corporate defendants in any litigation arising out of any transaction or occurrence anywhere in the world.<sup>334</sup> In general, all corporations must necessarily act through agents, but a wholly owned subsidiary may be an agent.<sup>335</sup> A principal is responsible for the actions of its agent if the principal and the agent manifest assent.<sup>336</sup>

Likewise, a subsidiary doing business of a parent may constitute presence. A corporation is “present in a forum State if it does business in the forum State ‘not occasionally or casually, but with a fair measure of permanence and continuity.’”<sup>337</sup> If an agent (or a subsidiary) is doing business of a parent, then the parent is subject to in *personam* jurisdiction of the state in which the activities occurred.<sup>338</sup> Solicitation of a business alone, on the other hand, is insufficient to find a

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<sup>330</sup> See FED. R. CIV. P. 4, 26

<sup>331</sup> *Bauman*, 134 S. Ct at 773 (Sotomayor, J., dissenting) (stating that the current “approach would preclude the plaintiffs...from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief.”).

<sup>332</sup> See *supra* text and accompanying note 262.

<sup>333</sup> *Shaffer*, 433 U.S. at 212 (invalidating notions of jurisdiction based on a State’s “power” over property of a defendant located in the State).

<sup>334</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (stating that “a master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”).

<sup>335</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013) (“the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. An essential element of agency is the principal’s right to control the agent’s actions” (citing RESTATEMENT (THIRD) OF AGENCY § 1.01, Comment *f* (2005))).

<sup>336</sup> *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) (internal citation omitted).

<sup>337</sup> *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985) (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)).

<sup>338</sup> *Curtis Publ’g Co. v. Cassel*, 302 F.2d 132, 137 (10th Cir. 1962); *D’Jamoos v. Pilatus Aircraft Ltd.*, 566

corporate presence in a forum state, but other factors must be present to support jurisdiction.<sup>339</sup> A parent corporation's branch offices (or subsidiaries) in a forum state suggest "doing business" and that establishes the corporation's presence. The presumption of corporate separateness must be overcome, by clear evidence, that the parent controls activities of its subsidiary.<sup>340</sup>

Typically, a parent-subsidiary's connection, either by doing business or by an agency relationship, seems sufficient for a parent-subsidiary's identity under the *presence model*.<sup>341</sup> By itself, a mere existence of a parent-subsidiary relationship is insufficient to establish a principal-agent relationship between two entities,<sup>342</sup> but the plaintiff's statement would suffice.<sup>343</sup> For example, in *Goodyear*, the Court held that the plaintiff, either below or in the brief, must urge [an orb web corporation] as a unitary entity so that jurisdiction over the parent would draw the subsidiaries as well.<sup>344</sup>

### *C. Presence: A Piercing Corporate Veil Theory*

In the contemporary setting, a piercing corporate veil in an orb-web corporation is controversial. For example, *Goodyear* stands for the proposition that a court may assert general jurisdiction over foreign (sister-State or foreign-country) corporations to hear any and all claims against them when they are affiliated essentially at home in the forum State.<sup>345</sup> In *Goodyear*, the Court said a connection between the forum and the foreign corporation must be "continuous and systematic."<sup>346</sup> In effect, the plaintiff would have to pierce the Goodyear corporate veil, at least for jurisdictional purposes.<sup>347</sup> So described, the text of the opinion suggests that the corporate veil is allowed for the fault of a foreign subsidiary as long as the foreign subsidiary maintains continuous contacts. In this view, if relief sought by a U.S. plaintiff against a U.S. subsidiary (or a foreign subsidiary) is directed against the U.S. parent orb web corporation, the courts should

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F.3d 94, 108-09 (3d Cir. 2009).

<sup>339</sup> *Landoil Res. Corp. v. Alexander & Alexander Serv. Inc.*, 918 F.2d 1039, 1044 (2d Cir. 1990).

<sup>340</sup> *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1162 (5th Cir. 1983).

<sup>341</sup> *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984); *Gallelli v. Crown Import LLC.*, 701 F. Supp 2d. 263 (E.D. N.Y. 2010).

<sup>342</sup> *See Flintridge Station Assoc. v. Am. Fletcher Mortgage Co.*, 761 F.2d 434, 437 (7th Cir. 1985) (citing *Matter of Chrome Plate, Inc.*, 614 F.2d 990, 996 (5th Cir. 1980)).

<sup>343</sup> *See Goodyear*, 564 U.S. at 930.

<sup>344</sup> *See id.*

<sup>345</sup> *See id.* at 921.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 930 (citing Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 14, 29-30 (1986) (merging parent and subsidiary for jurisdictional purposes requires an inquiry "comparable to the corporate law question of piercing the corporate veil").

recognize such veil-piercing theory.

In addition, the United States Supreme Court Rule 29.6 (or similar State court rules) mandates that [n]on-governmental corporate parties in “every document filed in the Supreme Court proceeding must list the name of all ‘parent corporations’ and any publicly held company that owns 10% or more of the corporate stock.”<sup>348</sup> If there is no parent or publicly held company owning 10% or more of a corporation’s stock, a notation to this effect shall be included in the documents.<sup>349</sup> Under the Court’s enterprise liability doctrine, jurisdiction over a U.S. parent corporation can be asserted by a U.S. plaintiff if he or she discloses the corporate disclosure statement early in the litigation.<sup>350</sup> Surely, a plaintiff may pierce corporate veil as long as the plaintiff does not intend to put an orb-web parent corporation out of its existence.<sup>351</sup>

In the traditional setting, the courts dislike piercing corporate veil.<sup>352</sup> To that end, one court established a two-step inquiry whereby “unity of interest and ownership that the separate personalities of the corporation and the individual [or a subsidiary] no longer exist[.]” and when “adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”<sup>353</sup> For example, in *DeWitt Truck Brokers Inc. v. W. Ray Flemming Fruit Co.*, the court noted that independent corporate status may be disregarded when factors such as gross undercapitalization, fraud, failure to observe corporate formalities, non-functioning of officers and directors, or similar circumstances indicate that the subsidiary is merely the shadow of the parent.<sup>354</sup>

Some courts follow a “horizontal veil piercing theory,” to sue a brother or a sister corporation of an orb-web corporation. For example, in *Walkovsky v. Carlton*,<sup>355</sup> a taxicab hit a pedestrian and injured him.<sup>356</sup> The pedestrian sued the corporation, which owned the taxicab.<sup>357</sup> The corporation owned nine other corporations and each owned two other taxicabs with minimum

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<sup>348</sup> SUP. CT. R. 29.6.

<sup>349</sup> SUP. CT. R. 29.6.

<sup>350</sup> *Goodyear*, 564 U.S. at 929-30.

<sup>351</sup> *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 95 (1926) (Cardozo, J., dissenting) (“when the sacrifice is so essential to the end that some accepted public policy may be defended or upheld.”).

<sup>352</sup> See *Alberto v. Diversified Grp., Inc.*, 55 F.3d 201, 203 (5th Cir. 1995) (stating that piercing the corporate veil is not favored in general, and the courts are reluctant to do so); *In re KZK Livestock, Inc.*, 221 B.R. 471, 478 (Bankr. C.D. Ill. 1998).

<sup>353</sup> *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569–70 (7th Cir. 1985).

<sup>354</sup> *Taylor v. Standard Gas & Electric Co.*, 96 F.2d 693, 704-05 (10th Cir. 1938), *rev’d on other grounds*, 306 U.S. 307 (1939).

<sup>355</sup> *Walkovsky v. Carlton*, 18 N.Y.2d 414 (1966).

<sup>356</sup> *Id.* at 416.

<sup>357</sup> *Id.* at 419.

insurance coverage required by the State law.<sup>358</sup> Moreover, the corporations operated out of the same garage in New York City using the same dispatching system.<sup>359</sup> The New York Court held that the brother or sister corporations were not responsible because the enterprise did not become either illicit or fraudulent merely because it consisted of many such corporations.<sup>360</sup> *Carlton* presents an example of a domestic U.S. corporation.<sup>361</sup> Thus, the plaintiff could have been entitled under a respondent superior or an agency theory to hold the enterprise responsible for the acts of its agents.<sup>362</sup>

The alter-ego theory suggests the presence if a parent company exerts substantial control over a subsidiary and shares the same integrated distribution system with the subsidiary for purposes of asserting jurisdiction.<sup>363</sup> To establish jurisdiction under this theory, the courts consider numerous factors: (1) common employees and offices; (2) central accounting system; (3) payment of wages by one corporation to another corporation's employees; (4) common business name; (5) services by the employees of one corporation on behalf of another corporation; (6) transfer of undocumented funds between corporations; and (7) allocation of unclear profits and losses between corporations.<sup>364</sup>

A party bringing a veil-piercing claim bears the burden of showing that the corporation is in fact a "dummy or sham" for another person or entity.<sup>365</sup> In determining whether two corporations are truly separate, significant factors to consider include adequacy of capitalization, overlapping directorates and officers, separate record keeping, payment of taxes and filing of

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<sup>358</sup> *Id.* at 416

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 417 ("the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil,' whenever necessary 'to prevent fraud or to achieve equity.'").

<sup>361</sup> *See infra* Part III.

<sup>362</sup> *Carlton*, 18 N.Y.2d at 420 ("a larger corporate entity composed of many corporations which, under general principles of agency, would be liable to each other's creditors in contract and in tort."); KLEIN, RAMSEYER, AND BRAINBRIDGE, *BUS. ASS'NS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS* 191 (7th ed. 2009).

<sup>363</sup> *Indah v. U.S. S.E.C.*, 661 F.3d 914, 921 (6th Cir. 2011) (citing *Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *see also In re Silicon Gel Brest Implants Prods. Liab. Litig.*, 887 F. Supp. 1447, 1452 (N.D. Ala. 1995) (stating that when a corporation is so controlled as to be the alter ego or mere instrumentality of its stockholders, the corporate form may be disregarded in the interests of justice).

<sup>364</sup> *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173-74 (Tex. 2007) (describing a "single business enterprise" approach).

<sup>365</sup> *See, e.g., Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378-79, 380 (7th Cir. 2008) ("dummy or sham" corporations); *Home-Stake Prod. Co. v. Talon Petrol., C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990) (refusing to "impute to the dominated corporation the forum contacts of its alter ego"); *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301-02 (9th Cir. 1986) ("[A] parent corporation's ties to a forum do not create personal jurisdiction over the subsidiary.").

consolidated returns, maintenance of separate bank accounts, level of parental financing and control over the subsidiary, and the subsidiary's authority over day-to-day operations.<sup>366</sup>

Although the Court in *Goodyear* touched upon it, the presence theory based on a piercing corporate veil is still uncertain because the State laws often interfere with the corporate veil theory, especially in the absence of any precedents.<sup>367</sup> This is especially true because often the state courts follow local business laws, but theoretically an orb-web corporation can be present through piercing a corporate veil in an appropriate situation.<sup>368</sup>

#### *D. Presence: A Consent Theory (or a Waiver)*

The consent and waiver approaches of the *presence model* are “two sides of the same coin.” A consent approach generally applies as an alternative to a principal place of business and a state of incorporation. In an orb-web corporation case, all domestic and foreign subsidiaries of a parent (or an orb) are automatically consented to the United States' jurisdiction.<sup>369</sup>

The concept of consent is a traditional basis of jurisdiction that predates the *minimum contacts model* that as set forth in *International Shoe*. A consent arguably be upheld even in the absence of the minimum contacts.<sup>370</sup> Traditionally, the states cannot compel a non-resident corporation to be adjudicated in the state court or to refrain from invoking the jurisdiction of the federal courts.<sup>371</sup> It is certainly fair to hold a party responsible to the court in which the party has deliberately and voluntarily engaged in a litigation-inducing behavior.<sup>372</sup> Professor Miller stated “the concept of consent grows problematic when the law extends beyond its core of thoughtful and deliberate action.”<sup>373</sup>

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<sup>366</sup> See 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43, 194 (Cum. Supp. 1987); see also *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d Cir. 1988) (indicating that the concept of complete domination by the parent is decisive); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995) (stating that courts have generally declined to find alter ego liability based on a parent corporation's use of a cash management system); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 34 (D. Mass. 1987) (emphasizing that a centralized cash management system [...] where the accounting records always reflect the indebtedness of one entity to another, is not the equivalent of intermingling funds); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978) (stating that arrangements by a parent and subsidiary for economy of expense and convenience of administration may be made without establishing the relationship of principal and agent).

<sup>367</sup> See Lonnie S. Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U PA. L. REV. 1023, 1032 (2004); see also Daniel G. Brown, Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 595 (1992).

<sup>368</sup> “Appropriate situation” means with any intent to harass the parent corporation.

<sup>369</sup> See *supra* discussion Part II.A-C.

<sup>370</sup> See 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 108.53, 108–95 (3d ed. 2009).

<sup>371</sup> *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

<sup>372</sup> *Kane v. New Jersey*, 242 U.S. 160 (1916) (stating that a State court, as a condition of using its new motor vehicle highways, requires out of State motorists to file certificates consenting to the State's jurisdiction).

<sup>373</sup> PROFESSOR MILLER, *supra* note 39, at 37.



Generally, consent is not required to occur within certain time limit. Under the traditional consent theory of jurisdiction, a party may consent to a court's jurisdiction prior to the suit's institution or at the time suit is brought or after suit has started.<sup>374</sup> And having objected to the absence of *in personam* jurisdiction, a defendant may rescind the objection, i.e., consent to the forum court's jurisdiction, at any stage of the proceedings.<sup>375</sup> It is easy and understandable that an individual can consent to the jurisdiction. However, in case of a corporation, how consent can be acquired?

In the recent cases, the Court overlooked the consent approach of *presence model*.<sup>376</sup> All cases decided after *International Shoe*, were under the *minimum contacts model*.

### 1. Consent: A Corporation's Voluntary Submission to a Forum State

If a corporate subsidiary is doing business in a forum state, then the subsidiary, at least with respect to that business, has voluntarily submitted to that State's jurisdiction.<sup>377</sup> One of the oldest tenets of personal jurisdiction is that if a non-resident corporate defendant voluntarily submits to the jurisdiction of a forum state, then the consent to the forum state is satisfied automatically.<sup>378</sup> A non-resident corporate defendant may manifest consent to a court's *in personam* jurisdiction in any number of ways, from failure seasonably to interpose a jurisdictional defense, to express acquiescence in the prosecution of a cause in a given forum, or to submission implied from a conduct.<sup>379</sup>

An equally well-established principle is that a state may exact from the nonresident, as a condition of performing some activity in the state, consent to personal jurisdiction.<sup>380</sup> Similarly, when a corporation is "present" or incorporated in a forum state, voluntary consent automatically satisfies.<sup>381</sup>

Consent not only applies to defendants but also applies to plaintiffs. Likewise, consent satisfies when a plaintiff voluntarily submits to the defendant's state for jurisdiction. It is the price that the plaintiff must pay to the state for allowing him or her to litigate in its courts. There is nothing arbitrary or unreasonable in treating the plaintiff as being there for all purposes for which

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<sup>374</sup> Gen. Contracting & Trading C. v. Interpole, Inc., 940 F.2d 20, 22 (1st Cir. 1991).

<sup>375</sup> *Id.*

<sup>376</sup> See sources cited in *supra* notes 4-8.

<sup>377</sup> Cf. Goodyear, 564 U.S. at 929-30 (stating that a North Carolina subsidiary is not responsible for foreign subsidiaries' tortious acts but that the parent can be challenged based on enterprise liability).

<sup>378</sup> RESTATEMENT (SECOND) CONFLICT OF LAWS § 47.

<sup>379</sup> See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939); *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 996 (1st Cir. 1983).

<sup>380</sup> See *Hess v. Pawloski*, 274 U.S. 352 (1927).

<sup>381</sup> See discussion *supra* Part II.A-C.

justice to the defendant requires his presence.<sup>382</sup> In certain situations, parties may agree in a contractual situation by consenting to jurisdiction of the forum by bringing a lawsuit in that forum.<sup>383</sup> When a defendant submits to the jurisdiction of the court by appearance, consent is satisfied.<sup>384</sup> Likewise, “implied consent is established when the defendant’s activities manifest an intention to submit to the power of a sovereign.”<sup>385</sup> The voluntariness prong ensures that the “defendant’s contacts” with the forum State are “not based on the unilateral actions of another party or a third person.”<sup>386</sup>

One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.<sup>387</sup> The principal may not expressly or impliedly require consent by an agent as a condition of authority, and the agent’s exercise of power within its scope of authority during the term for which it was given or within reasonable time will bind the principal.<sup>388</sup>

In the case of parent-subsidiary relationship, a relevant question raises great practical significance such as in *Goodyear* that whether a parent or a subsidiary can consent through one another for tortious conduct by a parent or its other subsidiary.<sup>389</sup> The Supreme Court’s decision in *Goodyear* provides the proposition that when a sister-subsidiary consents to a State court’s jurisdiction, the other sister-subsidiaries of the parent corporation are not construed to have consented to the forum State’s jurisdiction, but rather requires each subsidiary’s individual consent or similar understanding to that effect.<sup>390</sup> In *Goodyear*, the Court stated that Goodyear’s North

<sup>382</sup> *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938).

<sup>383</sup> See discussion *infra* Part II.D.3.

<sup>384</sup> *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

<sup>385</sup> *Gerber v. Riordan*, 649 F.3d 514, 523 (6th Cir. 2011).

<sup>386</sup> See *e.g.*, *Nowak v. Tak How Inves., Ltd.*, 94 F.3d 708, 716 (1996) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

<sup>387</sup> See FED. R. CIV. P. 4 (f); see also Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1032-71 (1961) (describing the importance of procedural rule in domestic and international settings).

<sup>388</sup> See generally 2 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 274 (3d ed. 1959); *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). In *National Equipment*, the plaintiff, a New York corporation, had leased equipment to the defendant, a Michigan farmer, under a form agreement that on its back appointed for the Michigan lessee farmer a New York resident to accept service of process. The plaintiff corporation sued the farmer in New York, and the farmer defaulted. The Court held that the parties’ appointment clause served as a consent to jurisdiction in the State of New York with which the farmer may not have the requisite minimum contacts under the appointment clause.

<sup>389</sup> PETER HAY, *supra* note 12, at 85, n.6.

<sup>390</sup> See *Global Presence*, GOODYEAR CORPORATE, <http://www.goodyear.com/corporate/about/facilities.html> (last visited Aug. 30, 2017) (showing that Goodyear tire and Rubber Corp. has world headquarters in Akron, OH. The corporation operates in five regions: (1) North America, (2) Europe, (3) Asia-Pacific, (4) Middle East, (5) Africa, and (6) Latin America. Goodyear USA is incorporated under the laws of New York and has plants in 21 locations in North America only. New York is also a principal place of business for Goodyear’s North America segments. In North

Carolina corporation did not object to the North Carolina State court's assertion of jurisdiction.<sup>391</sup> Thus, Goodyear's North Carolina Corporation consented or voluntarily submitted to the North Carolina State court's jurisdiction.<sup>392</sup> The Court found, however, that the same may not be true for subsidiaries Goodyear Turkey, Goodyear Luxemburg and Goodyear France.<sup>393</sup> Although the defendant may raise a defense of consent or waiver,<sup>394</sup> when a claim is related to a subsidiary's action in tort, the doctrine of vicarious liability arises,<sup>395</sup> and an orb-web parent can be liable without any exception.

## 2. Consent: A Corporation's Registration with a Forum State

The registration theory raises various difficult questions yet to be answered. A number of State and federal courts follow the consent theory, based on a registration approach that has remained unsuccessful.<sup>396</sup> Nevertheless, a corporation's voluntary registration to do business in a State is an automatic consent to jurisdiction, and such consent is a part of a bargain by which the corporation agrees to accept certain obligations in return for the right to do business in the State.<sup>397</sup> In a very early case, *Pennsylvania Fire Insurance*, the Court established the proposition that a State may exercise general jurisdiction over any foreign corporation that registered to do business in that State, which satisfies due process, but the proposition raised the question of constitutionality after *Pennoyer* and *International Shoe* and its progeny.<sup>398</sup> In *Pennsylvania Fire Insurance*, Justice Holmes articulated that the defendant corporation's designation of the Missouri Commissioner of Insurance as corporation's local agents. In *International Shoe*, the Court established that when a foreign corporation has not expressly consented to a State's jurisdiction by registration, "minimum contacts" with that State can provide a due process basis for finding implied consent to the State's

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Carolina, Goodyear operates three plants, and it is incorporated there. In this context, the North Carolina plant is a sister-subsiary of Goodyear, and not a parent corporation).

<sup>391</sup> See *Goodyear*, 564 U.S. at 916 (stating that "[i]n contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina.").

<sup>392</sup> See *supra* text and accompanying notes 369-83.

<sup>393</sup> See discussion *supra* Part I.

<sup>394</sup> See *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1559 (1st Cir. 1989).

<sup>395</sup> *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (stating that a claim against a principal for deliberate indifference based upon the master's knowledge of and acquiescence in unconstitutional conduct by its agent).

<sup>396</sup> See *Agribusiness United DMCC v. Blue Water Shipping Comp.*, 2017 WL 1354144, No. H-16-2249, at \*5 (S. D.Tex., 2017) (describing that although the defendant was registered to do Business in Texas, it did not have personal jurisdiction); *Figueroa v. BNSF R. Comp.*, 390 P. 3d 1019,1020 (Or. 2017) (stating that appointment of registered agent does not mean that the corporation is consented to the jurisdiction)

<sup>397</sup> *In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp 1265, 1278 (D. Md. 1981) (citing *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 175 (1939)).

<sup>398</sup> *Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 95 (1917);

jurisdiction.<sup>399</sup> However, implied (or express) consent is automatically satisfied when the U.S. based orb-web corporation has established a world headquarters in the United States.<sup>400</sup>

Can a court assert jurisdiction if a State has an interest in the litigation, and the litigation has casual connection with the forum State? The well-settled principle provides that when a corporation authorizes an agent to receive a service of process in compliance with the requirements of a State-registration statute, the corporation has consented in any action that is within the scope of the agent's authority and subject to the jurisdiction of that forum State.<sup>401</sup> When a defendant corporation applies for a certificate of authority and designates the Secretary of the State as its attorney for process, the defendant corporation has consented to be sued in a court in that forum State.<sup>402</sup> Consent is also satisfied when a defendant applies for and receives an authorization to do business in the forum State.<sup>403</sup>

Nonetheless, the registration theory is still a very problematical because each time the courts have used different languages and illustrated various approaches of registration. For example, in *Ratliff v. Cooper Laboratories, Inc.*, the Fourth Circuit Court held that the corporation's registration is merely applying and qualifying to do business in the State, not actually doing business.<sup>404</sup> However, in *Knowlton v. Allied Vanlines, Inc.*, the Eighth Circuit Court held that registration and appointment of an agent for a service of process was consent to jurisdiction, including consent to general jurisdiction, over an action unrelated to the forum State.<sup>405</sup> In *Wenche Siemer v. Lerjet Acquisition Corp.*, the Fifth Circuit Court held that the registration and an

<sup>399</sup> *Int'l Shoe*, 326 U.S. at 316-18; *Rudzewicz*, 471 U.S. at 474-76; *Perkins*, 342 U.S. at 446.

<sup>400</sup> *See Hertz Corp.*, 559 U.S. at 130.

<sup>401</sup> *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 170-71, 174-75 (1939)).

<sup>402</sup> *Dehne v. Hillman Inv. Co.*, 110 F.2d 456, 458 (3d Cir. 1940).

<sup>403</sup> *See, e.g., Fed. R. Civ. P. 12(h)(1)* (describing that a defendant may also forfeit its objections to personal jurisdiction by failing to raise them timely in the answer or in an initial motion).

<sup>404</sup> *Ratliff v. Cooper Labos., Inc.*, 444 F.2d 745 (4th Cir. 1971), *cert denied*, 404 U.S. 948 (1971). (In this case two drug manufacturing companies, Cooper Laboratories, Inc. and Sterling Drug Company, challenged the jurisdiction of the District Court of South Carolina brought by nonresidents for the case of action arising outside the State. The case involved diversity jurisdiction. The plaintiff was injured from the consumption of drugs manufactured by the defendants. The drugs at issue were neither manufactured nor consumed in South Carolina. Additionally, one of the plaintiffs was a resident of Florida and the other plaintiff was a resident of Indiana.

Defendant Cooper Laboratories was a Delaware corporation with its principal place of business in Mystic, Connecticut. The corporation's activities in South Carolina were limited to solicitation by mail to dealers and wholesalers, and the mailing of promotional literature to approximately 650 doctors on its mailing lists. Another defendant, Sterling Drug, a Delaware corporation, maintained its principal place of business in New York where it manufactured the drug taken by plaintiff Nichols. Sterling Drug filed an application and was given authority to do business in South Carolina and appointed an agent for service of process. Additionally, Sterling maintained five "detail men" who lived in South Carolina and promoted Sterling's products through personal contacts with doctors and drugstores throughout the State. The plaintiffs filed a claim in South Carolina because of the State's relatively long statute of limitations.)

<sup>405</sup> *Knowlton v. Allied Vanlines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990).

appointment of an agent does not constitute consent to jurisdiction, and it is unconstitutional.<sup>406</sup> In addition, the court said that an exercise of jurisdiction over a nonresident corporation is constitutionally permissible only when the foreign corporation's continuous and systematic contacts create a "general business presence" in the forum State...[,] "being qualified to do business... 'is of no special weight' in evaluating general personal jurisdiction[,] and "a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible."<sup>407</sup>

Inconsistent and different decisions by federal courts suggest that the courts are not firm on the principle of registration.

### 3. Consent: A Contractual Relationship by a Forum Selection Clause

Parties to a contract may consent to litigate disputes in a particular forum by inserting a forum selection clause into their contract.<sup>408</sup> Courts must give effect to . . . freely negotiated forum selection clauses.<sup>409</sup> If so, the only relevant inquiry for the courts is whether the forum selection clause is enforceable unless fraud, duress, or other coercive factors are present, which may preclude the consenting corporations from contesting on personal jurisdiction, unless they can clearly show that an enforcement of the clause was unreasonable.<sup>410</sup> Generally, a forum selection clause "designates that all disputes arising out of a contract must be litigated in the courts of a specific State. Not all forum selection clauses designate an exclusive forum. Many simply State that the parties consent to be sued in the courts of the specific State."<sup>411</sup>

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<sup>406</sup> *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181(5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

<sup>407</sup> *Id.* at 183.

<sup>408</sup> *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) (showing that this is the first leading Supreme Court case in which advance consent was upheld. In this case, Michigan farmers signed an equipment lease that allowed the New York lessor to litigate disputes arising out of the lease agreement in New York. The Supreme Court held that the clause was sufficient basis for jurisdiction; likewise, whether a party can limit the forum choice by contract was also addressed in this case); *Williams v. Life Savs. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986).

<sup>409</sup> *See Elec. Realty Assocs., L.P. v. Vaughan Real Estate, Inc.*, 897 F. Supp. 521, 523 (D. Kan. 1995); *see also KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999).

<sup>410</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-16 (1972). In this case the defendant, a German corporation, agreed to tow a drilling rig off Zapata, an American corporation from LA, to a point off Ravenna, Italy. The contract provided that any dispute arising must be treated before the London Court of Justice. The Court held that

selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of litigation. Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances, it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

<sup>411</sup> Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart*

As a general proposition, a defendant can consent to personal jurisdiction by entering into a contract containing a valid forum selection clause.<sup>412</sup> With respect to jurisdictional analysis, a corporation may be involved in a tortious act but may not be involved in any contractual relationship with the other party or a forum State. In the United States, the jurisdictional law on contract and tort claims functions differently.<sup>413</sup> Nevertheless, in *International Shoe*, the Court stretched the point, in dicta, that a corporation's tortious act might impose obligation or liability, but due process might satisfy in such a tortious cause of action if nature, quality, and circumstances of the cause of action warrant.<sup>414</sup> Another example case is *World-Wide Volkswagen Corp. v. Woodson*, a product liability case, which involved no contractual relation with the forum State. The Court recognized that besides the contract and tort cause of action in deciding jurisdiction, there are other factors to be considered such as reasonableness and fairness to the defendant.<sup>415</sup> In *Calder v. Jones*, the Court applied the effect test and held that California had jurisdiction over individual defendants for their tortious act because their action was intentional and expressly aimed at the forum State; therefore, jurisdiction is proper in California based on effects of the Florida defendant's conduct in California.<sup>416</sup>

The effect test established in *Calder* is similar to that of Brussel I regulation, which is quite clear that a single tort will support jurisdiction.<sup>417</sup> Under the Brussel I regulation, the State with jurisdiction over the principal defendant also has a jurisdiction over a third-party defendant for the purposes of claims for contribution or liability, and in such case no affiliation or third-party defendant need to be shown. In contrast, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*,<sup>418</sup> the Court was concerned that foreign retaliation issues might raise in extraterritorial

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and *Carnival Cruise*, 45 FLA. L. REV. 361, 380 (1993).

<sup>412</sup> See, e.g., *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 726 (8th Cir. 2001).

<sup>413</sup> See generally PROSSER AND KEETON ON TORTS 655-76 (5th ed. 1984) (stating that under tort claims the plaintiff may claim for wrongful death, product liability, intentional tort etc.); see PETER HAY, CONFLICT OF LAWS 80-81 (13th ed. 2009); see also Thomas A. Rossi, *Lender Liability in Kansas: A Paradigm of Competing Tort and Contract Theories*, 29 WASHBURN L.J., 495, 516-17 (1990).

<sup>414</sup> *Int'l Shoe*, 326 U.S. at 318 (citing *Rosenberg Bros. Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (stating that jurisdiction would not be upheld on out of State dealer whose only connection with the forum State was only to purchase of merchandise, which were made sometimes by visiting salesman or by mail under the Motor Vehicle Act)).

<sup>415</sup> *World-Wide Volkswagen*, 444 U.S. at 292 (internal citation omitted).

<sup>416</sup> *Calder v. Jones*, 465 U.S. 783 (1984).

<sup>417</sup> COUNCIL REG. 44/2001 22 DEC. 2000 on PETER JURISDICTION & RECOGNITION & ENFORCEMENT OF JUDGMENTS IN CIV. & COM. MATTERS, <http://www.columbia.edu/~mr2651/e-commerce3/2nd/statutes/BrusselsRegulation.pdf>; see PETER HAY, *supra* note 10, at 1062, 1066-67 (showing that a regulation has a general application and binding entirely and directly to its member States. This regulation has the same function as a federal statute in the United States. Article 5(3) of Regulation I states that matters relating to tort, *delict* or *quasi delict*, will be litigated in courts of the place where the harmful event occurred or may occur. Under Article 5(3) of the Regulation, in the European Union, there is specific jurisdiction at the place where the tort action is occurred.).

<sup>418</sup> *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

cases if the US law were to be imposed.<sup>419</sup> However, the subsidiaries of a U.S. parent corporation have already consented to jurisdiction of the United States courts by accepting the parent corporation's world headquarters, and thus, dual citizenship of the subsidiaries is satisfied.

However, in *Scherk v. Alberto-Culver Co.*,<sup>420</sup> the plaintiff was an American company incorporated in Delaware with its principal office in Illinois. The company manufactured and distributed toiletries and hair products in the United States and abroad.<sup>421</sup> The plaintiff expanded its overseas operations in Germany under the ownership of a German entity.<sup>422</sup> Pursuant to their contract agreement, the German entity transferred its ownership along with all rights and trademarks to the plaintiff.<sup>423</sup> Their contract also contained a number of express warranties and choice-of-law provisions and that "[t]he laws of the State of Illinois, U.S.A. shall apply to and govern their agreement, its interpretation and performance."<sup>424</sup> Later, the plaintiff discovered that the trademark rights it purchased under the contract were subject to substantial encumbrances that threatened to give others superior rights and restrict or preclude the plaintiff's use of them.<sup>425</sup> The plaintiff commenced an action against the German entity.<sup>426</sup> In deciding personal jurisdiction, the Court found that "[t]wo policies, not easily reconcilable, are involved in this case."<sup>427</sup> One is the choice of law provision and the Securities Act of 1933 both were "[d]esigned to protect investors and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale by creating a special right to recover for misrepresentation."<sup>428</sup> These types of challenges draw the attention of practitioners to look beyond the facts of the case because a contract between a parent and subsidiary often carries special contractual terms, including indemnification.

*E. Importance of an Adequate Notice to Subsidiaries Located Outside the United States: The Hague Convention*

Service of process outside the forum was not allowed in *Pennoyer*. Later, in *International Shoe*, the Court allowed a service of process outside the State's border. Later still, Congress

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<sup>419</sup> See *id.* at 21 (recognizing that vast application of U.S. law in a foreign setting could invite retaliatory response from other nations).

<sup>420</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>421</sup> *Id.* at 508.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* at 509.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

allowed under the Hague Convention service of process outside the United States' border by signing a multilateral treaty that provided a simpler way to serve a process abroad, ensured defendants sued in foreign jurisdictions (in the United States) would receive actual and timely notice of suit, and facilitated proof of service abroad.<sup>429</sup> When a domestic corporation is not a subsidiary of the foreign-born orb corporation, then service on the domestic corporation does not effectuate proper service on the foreign company (or the orb corporation) if the companies do not own corporate stock of each other, and do not share expenses profits, losses, office facilities, bookkeeping, equipment or other property.<sup>430</sup> When a corporation and its wholly-owned subsidiary maintain separate corporate identities, "though perhaps merely formal," service on the subsidiary is not a valid service on its parent, despite the identity of interests between the parent and its subsidiary and despite control by the parent over the subsidiary's operations.<sup>431</sup>

The Convention applies to choice of court agreements "concluded in civil or commercial matters."<sup>432</sup> The Convention excludes consumer and employment contracts and certain specified subject matters.<sup>433</sup> The reasons for these exclusions are, in most cases, the existence of more specific international instruments, and national, regional, or international rules that claim exclusive jurisdiction for some of these matters.<sup>434</sup> An agreement designating one or more specific courts in a contracting State is deemed to be exclusive unless the parties have expressly provided otherwise.<sup>435</sup> In addition, a contracting state may declare that it will recognize and enforce judgments given by courts designated in a non-exclusive choice of court agreement.<sup>436</sup>

Under the Hague Convention, "[s]ervice of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action," as determined by the otherwise applicable State rules governing the method of service.<sup>437</sup> In case of service of process for a foreign corporation, the Hague Convention is applicable, and its provisions preempt inconsistent methods of service prescribed by State law.<sup>438</sup> Thus, when one of the parties

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<sup>429</sup> *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 698.

<sup>430</sup> *Rhodes v. J.P. Sauer & Sohn, Inc.*, 98, F. Supp. 2d 746, 750 (W.D. La. 2000).

<sup>431</sup> *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925).

<sup>432</sup> *See Convention on the Choice of Court*, HAGUE CONF. ON PRIV. INT'L L., Nov. 25, 1965, 220 U.N.T.S. 121, <https://assets.hcch.net/docs/2744a587-a7c1-4030-8cee-9b0c20b7e28a.pdf>.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Schlunk*, 486 U.S. at 700.

<sup>438</sup> *Id.* at 699.



is a foreign defendant (or a foreign plaintiff), service of process must comport with the Hague Convention.<sup>439</sup>

In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa* (“*Aerospatiale*”),<sup>440</sup> the Court suggested that the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States.<sup>441</sup> The Court explained that if the Hague Convention is used as the exclusive means for obtaining evidence located abroad, then every American court hearing a case involving a contracting State must follow the internal laws of that State.<sup>442</sup>

Since both The Hague Convention and Federal Rules of Civil Procedure are authorized by the federal statutes, comity and federalism concern may not apply when requesting a document from the foreign signatory states because these states have arguably consented by signing the treaty with the United States.<sup>443</sup> Hence, for example, in *Trans World Airlines v. Franklin Mint Corp.*,<sup>444</sup> the Court said that a

[t]reaty is in the nature of a contract between nations. Under the doctrine of “*rebus sic stantibus*,” a nation which is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its obligations under the treaty. But when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf.<sup>445</sup>

Our Constitution states that treaties are the supreme law of the land.<sup>446</sup> For example, in *Bacardi Corporation of America v. Domenech*,<sup>447</sup> the Court held that “every mark duly registered or legally protected in one of the contracting States shall be admitted to registration or deposit and legally protected in the other contracting States, upon compliance with the formal provisions of

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<sup>439</sup> See *id.* at 706-07 (stating that Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under State law, is a foreign corporation’s involuntary agent for service).

<sup>440</sup> *Societe Nationale Industrielle Aerospatiale v. United States S.D. of Iowa*, 482 U.S. 522 (1987).

<sup>441</sup> *Aerospatiale*, 482 U.S. at 533.

<sup>442</sup> See *id.* at 534 (“The text of the Evidence Convention itself does not modify the law of any contracting State, require any contracting State to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting State to change its own evidence-gathering procedures.”).

<sup>443</sup> *Id.*

<sup>444</sup> *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

<sup>445</sup> *Id.* at 253 (internal citation omitted).

<sup>446</sup> U.S. CONST. art VI.

<sup>447</sup> *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150 (1940).

the domestic law of such States.”<sup>448</sup> Bacardi Corporation of America, a Pennsylvania corporation, authorized and entitled to manufacture and sell rum in Puerto Rico under the trademark and label of *Compania Ron Bacardi, S.A., a Cuban corporation*.<sup>449</sup> The parties maintained their contractual terms for more than 20 years.<sup>450</sup> Despite the prohibition in Cuba, the defendant sold rum in Puerto Rico and throughout the United States under the trademark, which included the word “Bacardi” or “Bacardi y Cia.”<sup>451</sup> The trademark was duly registered in the United States Patent Office and in the Office of the Executive Secretary of Puerto Rico.<sup>452</sup> The Court held that when a treaty becomes law through ratification, then no special legislation is necessary to make it effective.<sup>453</sup>

Accordingly, when filing a case against such foreign corporation, practitioners must determine whether there are treaties or international agreements. However, U.S. procedural laws do not allow the discovery until a case is filed in a court.<sup>454</sup> Extensive discovery could be a viable option, but it is not a right option due to costs involved in the discovery process.<sup>455</sup> Even though a parent and subsidiaries are separate entities, they are nevertheless bound by anticompetitive conduct clauses and to redress anticompetitive harm through indemnification. Under these sets of considerations, a U.S.-born orb-web corporation should be treated as one web under the *presence model*.

### III. GENERAL JURISDICTION OVER U.S. SUBSIDIARIES OF FOREIGN-BORN, ORB-WEB CORPORATIONS

#### A. Introduction of Current Law

It would be unwise to assume jurisdiction over a foreign-born orb-web corporation without first analyzing the text of the Fourteenth Amendment, which says

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges and immunities of citizens of the United States; nor shall any State

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<sup>448</sup> *Id.* at 158-59.

<sup>449</sup> *Id.* at 153.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 161.

<sup>454</sup> FED. R. CIV. P. 26.

<sup>455</sup> SHIRA A. SCHEINDLIN ET AL., AMERICAN CASEBOOK SERIES: ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 458-72 (2d ed. 2012) [hereinafter SCHEINDLIN].

deprive any person of life, liberty, or property without the due process of law;  
nor deny to any person within its jurisdiction the equal protection of the laws.<sup>456</sup>

Arguably, when a corporation is not a citizen of the United States, the Fourteenth Amendment cannot be asserted on an orb-web corporation's parent.<sup>457</sup> Under the equality notion, one nation cannot impose its rule on others even though the imposing nation has a right to do so.<sup>458</sup> A foreign-born orb-web corporation operates its businesses in the United States in three different ways: (a) by incorporating a subsidiary in the United States,<sup>459</sup> (b) by establishing an agency in the United States,<sup>460</sup> or (c) by establishing a shell corporation in the United States.<sup>461</sup> Often these subsidiaries have some sort of contract with the host nation.<sup>462</sup>

If an orb-web corporation is not born in the United States, but operates its business in the United States through its subsidiary incorporated in the United States, then the state courts can establish general jurisdiction under the *presence model* over the subsidiary only as an independent domestic corporation.<sup>463</sup> The crux of the relationship requires a determination as to whether due process is satisfied. In *Bank of Augusta v. Earle*,<sup>464</sup> the Court said:

The question is not on the powers of a corporation, but as to whom and to what objects those powers can be exerted. A corporation is the creature of the law, and it is clothed with all the powers of a person. The position, on the other side, is that when it leaves the State, which gave it existence by granting its charter, it loses its personal existence, and has no existence whatever. This is a harsh doctrine, and seems at war with the principles of those who assert and maintain State rights.<sup>465</sup>

Although it is true that a corporation is a person, citizenship of a corporation is different from a citizenship of an individual. Once an individual moves out of a State with intent to reside in some other State, then the new place where the individual intends to reside qualifies as a new

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<sup>456</sup> U.S. CONST. amend XIV.

<sup>457</sup> *See id.*

<sup>458</sup> *The Antelope*, 23 U.S. 66, 122 (1825).

<sup>459</sup> *See infra* Part III.C.

<sup>460</sup> *See Daimler AG v. Bauman*, 134 U.S. 754 (2014); *See infra* Part III.D.

<sup>461</sup> *See infra* Part III.E.

<sup>462</sup> *See supra* diagram I

<sup>463</sup> *See discussion supra* Part II.

<sup>464</sup> *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

<sup>465</sup> *Id.* at 524.

domicile of that individual.<sup>466</sup> However, in the case of a corporation, citizenship is granted where the corporation is born and one other place where the corporation runs its business.<sup>467</sup>

However, the problem for practitioners is determining whether the corporation is an orb-web corporation and whether the orb-web corporation is born in the United States (or abroad). For example, in *Goodyear*, the plaintiff did not raise a corporate disclosure, which showed that any subsidiary that owned more than 10% of a parent company must be alleged and disclosed to claim enterprise liability.<sup>468</sup> Perhaps, a simple company portfolio would have revealed where the Goodyear subsidiaries were positioned Goodyear's corporate web.

### *B. A Plaintiff's Responsibility of Simple Discovery*

As a practical matter, discovering who or what is central to the sources of controversy that must be identified. For example, for an orb-web corporation born in the United States, it would be comparatively easy for practitioners to determine who is the parent and who is the subsidiary. However, when only a subsidiary corporation of a foreign parent is present in the United States, this analysis becomes very complex, if a plaintiff decides to sue a foreign parent (orb) corporation. Therefore, practitioners must identify, as the first step of litigation, corporate name, State or States of incorporation, dates of incorporation, names and principal places of business, States where the corporation is licensed to transact business, charter number, issuance date, and whether a license to transact business was ever expired or revoked.<sup>469</sup>

Practitioners should also attempt to gather each date upon which a present or former officer, agent, or employee of the corporation has been physically present in the state in past years; the corporation's mailing address;<sup>470</sup> and any corporate products, goods or services performed, manufactured, processed, or sold by the corporation; general descriptions of products sold and these transactions' volume.<sup>471</sup> In addition, general web-search may reveal a great deal of publicly available information, such as revenue generated by the corporation and its subsidiaries as one unit, the name of the parent and all affiliated subsidiaries, and goods and products sold in the territory, state, country, or continent.<sup>472</sup>

Orb-web-corporations are extremely complex and most cases were lost in this process of identifying the true corporate structure. For example, in *Lots Co. Ltd. v. Hon Hai Precision*

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<sup>466</sup> *Mas v. Perry*, 489 F.2d 1396, 1399, *cert denied*, 419 U.S. 842 (1974) (stating that “[a] person’s domicile is the place of ‘his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom’”).

<sup>467</sup> *See supra* note 127 and accompanying text. However, this rule applies only to non-orb-web corporations.

<sup>468</sup> *See supra* text and accompanying notes 340-41.

<sup>469</sup> *See* JOHN HARDIN YOUNG ET AL., WRITTEN ELECTRONIC DISCOVERY THEORY & PRACTICE at 320-21 (5th ed. 2009) [hereinafter HARDIN YOUNG].

<sup>470</sup> *See id.* at 321.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

*Industry Co.*,<sup>473</sup> the plaintiff was a Taiwanese electronics manufacturing company<sup>474</sup> that specialized in designing and manufacturing USB connectors for notebook computers in China.<sup>475</sup> Plaintiff generally sold its USB connectors to Chinese companies (“ODMs”), which then made and assembled computer products, incorporating USB connectors for many well-known computer brands, such as Acer, Dell, HP, and Apple.<sup>476</sup> Those name-brand computer products, in turn, made their way into the hands of consumers and businesses around the world, including the United States.<sup>477</sup> The evidence was presented to the court that roughly 94% of global notebook computers were assembled by ODMs.<sup>478</sup> The federal district court found that the relationship among the “defendants”<sup>479</sup> was not clear.

Defendant Hon Hai is an orb-web corporation founded in 1974 by Hon Hai Precision Industry Company Ltd., anchor company of Hon Hai / Foxconn Technology Group. Hon Hai devoted itself to integrating expertise in mechanical and electrical parts and an uncommon concept to provide the lowest “total cost” solution to increase the affordability of electronics products for all mankind.<sup>480</sup> The corporation also claims that

Today, Hon Hai / Foxconn Technology Group is the most dependable partner for joint-design, joint-development, manufacturing, assembly and after-sales services to global Computer, Communication and Consumer-electronics (“3C”) leaders. Aided by its legendary green manufacturing execution, uncompromising customer

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<sup>473</sup> *Lotes Co. Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 399-400 (2nd Cir. 2014).

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Lotes Co. Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 399 (2nd Cir. 2014). The court said that

The defendants are a group of companies that compete with Lotes in making and selling USB connectors. They also are involved in making, assembling, and distributing electronic components and devices that incorporate USB connectors. Defendant–Appellee Hon Hai Precision Industry Co., Ltd. (“Hon Hai”) is a Taiwanese corporation that is one of the world’s largest manufacturers of electronic components, including USB connectors. Defendant–Appellee Foxconn International Holdings, Ltd. is a Cayman Islands corporation specializing in the design and manufacture of components for consumer electronics products, and is one of the largest exporters from China. Defendant–Appellee Foxconn International, Inc. is a California corporation that receives products from other Foxconn companies for distribution within the United States. Defendant–Appellee Foxconn Electronics, Inc. is another California corporation that designs and manufactures components for consumer electronics. Defendant Foxconn (Kunshan) Computer Connector Co., Ltd. (“Foxconn Kunshan”) is a Chinese ODM.

<sup>480</sup> See FOXCONN/HONHAI, [http://www.foxconn.com/GroupProfile\\_En/GroupProfile.html](http://www.foxconn.com/GroupProfile_En/GroupProfile.html) (last visited Aug. 30, 2017).

devotion and its award-winning proprietary business model, eCMMS, Hon Hai has been the most trusted name in contract manufacturing services (including CEM, EMS, ODM and CMMS) in the world.<sup>481</sup>

As an orb-web corporation, Hon Hai expanded its business within a very short time and currently possesses a net capital of \$147,934,068,630.<sup>482</sup> The plaintiff brought an action against these defendants alleging that they competed with the patent to control and gain monopoly over USB connectors, in violation of the Sherman Act and State law.<sup>483</sup> Given this case's particular facts, how should the courts determine the jurisdiction under the existing *minimum contacts model*?

As noted, one of the defendants was from the U.S. and subject to the jurisdiction of the courts of the United States.<sup>484</sup> It may also have been likely that the U.S. defendant was a subsidiary of Hon Hai/Foxconn.<sup>485</sup> The court noted the difficulties of identifying the corporate relationship between the defendants because the lower courts do not have guidance to determine such cases and individual plaintiffs are unable to set forth a *prima facie* case by showing a corporate governance of such a foreign-born, orb-web corporation.<sup>486</sup>

The preliminary search may provide the information about which corporation is a parent of an orb-web corporation and which corporations are its subsidiaries. This may enable the practitioners to identify whom to sue: a parent, subsidiaries, or an agent. Although web information may not provide a plaintiff an authority, it would certainly help.

### *C. A Foreign-born, Orb-Web Corporation's Incorporated Subsidiaries in the United States*

These types of corporations are web corporations, either vertically or horizontally, attached with a parent (orb) corporation and provide necessary resources to the orb. Although they are part of the same web construction, a parent is not born in the United States (but born abroad), so it will not be fair to call up the parent for its subsidiary's fault in tort or personal injury cause of actions in the United States unless some other lawful means are available.<sup>487</sup>

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<sup>481</sup> *Id.*

<sup>482</sup> *See id.* (stating that it ranked among 32 companies).

<sup>483</sup> *See id.*

<sup>484</sup> *See id.*

<sup>485</sup> *See id.*

<sup>486</sup> Hon Hai Precision Indus. Co., 753 F. 3d at 399.

<sup>487</sup> *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("The Court therefore held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.")).

At least two precedent cases, *Japan Line, Ltd. v. Cnty. Los Angeles*<sup>488</sup> and *Bauman*, offer that the state courts cannot preclude a U.S. plaintiff from adjudicating a claim against a subsidiary of a foreign-born, orb-web parent.<sup>489</sup> By fair means, such a foreign-born parent corporation may be burdened by the laws of the country in which it was born--in the same way as a U.S. born orb-web corporation is bound by the United States laws.<sup>490</sup>

For example, in *Japan Line, Ltd.*, the Court said that “more elaborate inquiry” is needed when a State seeks to tax foreign instrumentalities rather than domestic businesses engaged in interstate commerce.<sup>491</sup> The Court set two-part inquiries:

first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from “speaking with one voice when regulating commercial relations with foreign governments.” If a State tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.<sup>492</sup>

The Court reasoned that in former, the goal is to avoid multiple taxation of the instrumentalities of foreign commerce, and in the latter, signing a convention to reflect a national policy to remove impediments as “instruments of international traffic.”<sup>493</sup> However, Congress has adopted flexibility and allowed States to regulate “matters of local state concern, even though in some measure it affects commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”<sup>494</sup> In addition, the interpretation of the Friendship, Commerce, and Navigation Treaty is generally controlling unless it provides a result that is inconsistent with an intent or expectation of its signatories.<sup>495</sup>

In *Bauman*, on the other hand, the plaintiffs argued that Daimler could be sued based on its agency relationship or a subsidiary relationship with MBUSA.<sup>496</sup> California’s long-arm statute allows the exercise of personal jurisdiction “to the full extent permissible under the United States

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<sup>488</sup> *Japan Line, Ltd. v. L.A. Cnty.*, 441 U.S. 434, 452-53 (1979).

<sup>489</sup> See *infra* Parts III.D, E.

<sup>490</sup> *Am. Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 (1976) (“We are unable to say that the treatment of foreign corporations affected by Exception 27 constitutes discrimination repugnant to the Equal Protection Clause. The gist of appellant’s argument is that, because Exception 27 does not require that plaintiff demonstrate the existence of his cause of action, there was ‘[d]enied to appellant...a virtually unique opportunity afforded to domestic corporations, to preview its adversary’s case in chief except as to the extent of damages’”).

<sup>491</sup> *Id.* at 451.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.* at 452-53 (citation omitted).

<sup>494</sup> *Japan Line, Ltd.*, 441 U.S. at 434.

<sup>495</sup> *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (citation omitted).

<sup>496</sup> *Bauman*, 134 S. Ct. at 751.

Constitution.”<sup>497</sup> Daimler argued that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.<sup>498</sup> Upholding the *minimum contacts model*, the Court held that Daimler was not “at home”<sup>499</sup> and could not be sued for injuries in California.<sup>500</sup> The Court said that it had not yet addressed whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-State subsidiary.<sup>501</sup>

The Court reasoned that neither Daimler nor MBUSA was incorporated in California, nor did either entity have its principal place of business there.<sup>502</sup> If Daimler’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA had sizable sales.<sup>503</sup> Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-State defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>504</sup>

However, in doing so, the Court did not consider the risk of loss shifting from orb-web corporations to the individuals harmed by their actions even though the orb-web corporation had a massive presence in multiple States and in multiple countries.<sup>505</sup> Justice Sotomayor was concerned that a U.S. business might enter into a contract with a foreign country to sell its products, but may not be able to seek relief in any U.S. court if the multinational company breaches the contract, even if that company has considerable operations in numerous U.S. forums.<sup>506</sup> Nevertheless, it precludes a plaintiff, in these examples, from seeking legal recourse anywhere in the United States even if no other judicial system is available to provide relief.<sup>507</sup> Justice Sotomayor also made a wonderful comment concerning “the change in the navigation of the time” that

The proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be

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<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* at 759.

<sup>502</sup> *Id.* at 761.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at 762 (internal citation omitted).

<sup>505</sup> *Id.* (Sotomayor, J., concurring) (internal citation omitted).

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*



immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be. For instance, the majority holds today that Daimler is not subject to general jurisdiction in California despite its multiple offices, continuous operations, and billions of dollars' worth of sales there. But imagine a small business that manufactures luxury vehicles principally targeting the California market and that has substantially all of its sales and operations in the State—even though those sales and operations may amount to one-thousandth of Daimler's. Under the majority's rule, that small business will be subject to suit in California on any cause of action involving any of its activities anywhere in the world, while its far more pervasive competitor, Daimler, will not be. That will be so even if the small business incorporates and sets up its headquarters elsewhere (as Daimler does), since the small business' California sales and operations would still predominate when "apprais[ed]" in proportion to its minimal "nationwide and worldwide" operations.<sup>508</sup>

Ironically, Daimler AG claims that special items affect its earnings before interests and taxes, including (a) restricting its own dealer network; (b) relocation of MBUSA's headquarters; (c) sales of real estate in the United States.<sup>509</sup> Daimler AG also says that out of 460 units (in thousands of cars) sold in 2015, only 65 units (in thousands) were sold in Germany while 88 units sold in the United States.<sup>510</sup> Daimler Financial Services provide 108.9 billion euros worth of revenue, out of which the United States and Latin America contributed 48.5 billion euros.<sup>511</sup>

Mercedes-Benz USA (MBUSA), headquartered in Montvale, New Jersey, is responsible for the distribution, marketing, and customer service for all Mercedes-Benz products in the United States.<sup>512</sup> Daimler made a public statement that its individual business unit set yet another record in the second quarter and sold more than 500,000 passenger cars, 20% more than the last quarter.<sup>513</sup> In the year 2015, it sold more than 960,000 vehicles, 19% increase over the same period last year.<sup>514</sup> Daimler claimed that due to relocation of MBUSA headquarters, Daimler lost 20 million euros.<sup>515</sup>

28 U.S.C. § 1350 provides that the district court shall have an original jurisdiction of any civil action by an alien for a tort only, committed in violation of any civil nations or treaty of the

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<sup>508</sup> *Id.* at 772 (Sotomayor, J., concurring) (internal citation omitted).

<sup>509</sup> Daimler, Corporate Presentation (Spring 2015), <https://www.daimler.com/dokumente/investoren/praesentationen/daimler-ir-corporatepresentation-spring-2015.pdf>.

<sup>510</sup> *Id.* at 58.

<sup>511</sup> *Id.* at 71.

<sup>512</sup> *See id.*

<sup>513</sup> *See id.*

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 54.

United States taken by an alien.<sup>516</sup> Nevertheless, the Court stated that Daimler AG and MBUSA had an independent contractor agreement under which the parties agreed that MBUSA would not be liable against any claim against Daimler AG because MBUSA was not an agent of Daimler under their contract and thus no agency relationship was established.<sup>517</sup> The Court's decision is incorrect for several reasons.<sup>518</sup> First, there should be no exception under this fact alone that jurisdiction depends upon the state of things when the action is brought.<sup>519</sup> Second, the Court has recognized the citizenship of general and limited partners when determining the citizenship of parties.<sup>520</sup> Third, Daimler AG has established the principles of Corporate Social Responsibility stating that

Such a culture enables us to provide our employees with adequate compensation in line with the concept of equal treatment. We ensure their health and occupational safety, support their professional advancement, and safeguard their basic rights on the job. We strive to create working conditions that promote a work-life balance. To these ends, we work together with employee representatives in a spirit of trust, abiding by the Principles of Social Responsibility that Daimler has agreed upon together with employee representatives throughout the Group.<sup>521</sup>

Fourth, this case provided substantial reasons to assert jurisdiction over the subsidiary of the foreign-born, orb-web corporation under the *presence model*<sup>522</sup> because the Full Faith and Credit Clause allows jurisdiction over a corporate subsidiary who is residing (permanently) in the United States.<sup>523</sup> Although the Fourteenth Amendment and Full Faith and Credit Clause would not be applicable to the foreign parent (orb) corporation, these constitutional provisions enacted in consideration to provide the protection to the United States citizens and its permanent residents.<sup>524</sup> Therefore, the Court should recognize the State courts' jurisdiction over a subsidiary of a foreign-born, orb-web corporation in future cases.

#### *D. A Foreign-Born, Orb-Web Corporation's Operations through an Agent*

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<sup>516</sup> See *supra* note 142 and accompanying text.

<sup>517</sup> Bauman, 134 S. Ct. at 760, n.15.

<sup>518</sup> See *infra* text and accompanying notes 518-23.

<sup>519</sup> Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004) (Scalia, J.)

<sup>520</sup> See *supra* Parts I, II.

<sup>521</sup> Corporate Governance: Integrity Code, DAIMLER, <https://www.daimler.com/documents/sustainability/integrity/daimler-integritycode.pdf> (on file with the author).

<sup>522</sup> See *supra* Part II.

<sup>523</sup> See *supra* Part I.

<sup>524</sup> See *id.*

A foreign orb-web corporation's relationship with its U.S. agency can be contractual in nature. If a foreign corporation appoints an agent in the United States for a service of process, then the agent is under contract with the foreign corporation to confer jurisdiction.<sup>525</sup> However, a proper service upon the agent, under a valid State statute, constitutes consent to be sued in the federal courts.<sup>526</sup> Congress had provided the federal courts concurrent jurisdiction with all fifty States.<sup>527</sup> Hence, this approach provides another avenue to determine jurisdiction.

*E. A Foreign-Born, Orb-web Corporation's Operations by Establishing a Shell Corporation (or a Subsidiary) in the United States*

A foreign-born, orb-web corporation's operations through a shell subsidiary or fictitious entity is often to create an illusion of a legitimate look to carry the parent corporation's business objectives.<sup>528</sup> The question of whether a corporation is a shell subsidiary is a fact-intensive inquiry and requires extensive discovery. For example, in *United States v. Daimler AG*,<sup>529</sup> the Justice Department (DOJ) claimed that Daimler AG, formerly Daimler Chrysler AG and Daimler Benz AG ("Daimler"), sold vehicles all over the world including to government and other State-owned entities. Individual and institutional investors owned Daimler.<sup>530</sup> In doing so, Daimler became an issuer under the United States law, traded stocks in the New York Stock Exchange, and circulated more than one billion shares.<sup>531</sup> The revenue received in these transactions was wired to U.S. bank accounts or foreign bank accounts.<sup>532</sup> Daimler incorporated a shell company in the United States to enter other stock exchanges.<sup>533</sup> The Federal District agreed with the DOJ and granted a little over 93 million dollars in criminal penalty payable immediately to DOJ.<sup>534</sup>

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<sup>525</sup> *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939).

<sup>526</sup> *Id.* at 170.

<sup>527</sup> See YEAZELL, *supra* note 1, at 177; but see *BNSF R. Co.*, 137 S. Ct. at 1557 ("[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction").

<sup>528</sup> See *supra* text and accompanying notes 458-61.

<sup>529</sup> Compl. at 1, *United States v. Daimler AG*, No. 10-cr-063, (D.D.C. March 22, 2010), available at <https://www.justice.gov/criminal-fraud/case/united-states-v-daimler-ag-court-docket-number-10-cr-063-rjl>.

<sup>530</sup> U.S. Dep't of Just., Off. Pub. Affs., *Daimler and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$ 93.6 Million in Criminal Penalties* (Sep. 15, 2014), available at <https://www.justice.gov/opa/pr/daimler-ag-and-three-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and>.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

In *Holland v. United States*,<sup>535</sup> the Court said that such shell corporations provide an inference of willfulness by establishing a consistent pattern of underreporting large amounts of income.<sup>536</sup> A corporation's intent plays a major role in creating shell entities to conceal certain unlawful acts or increase its net revenue.<sup>537</sup> Therefore, asserting jurisdiction over such subsidiaries do not offend the traditional notion of fair play and substantial justice.

Hence, these subsidiaries should be treated as a domestic corporation and should follow the same jurisdictional analysis as a domestic corporation in the United States as discussed in Parts I-III.

#### IV. JURISDICTION OVER FOREIGN CORPORATIONS ENGAGED IN THE STREAM OF COMMERCE

##### A. Analysis under the Current Regime

Asserting jurisdiction in the State courts, in the stream-of-commerce cases, is notoriously challenging compared to asserting jurisdiction over orb-web corporations. Because tort, contract, and product liability are State substantive laws, and a State is obligated in protecting its citizens from defective products that brings harm to its citizens.<sup>538</sup> In *McIntyre*, the Court explained that in a typical stream of commerce case, a nonresident defendant acting *outside* the forum places a product in the stream of commerce that ultimately causes harm *inside* a forum.<sup>539</sup> However, stream of commerce cases are much different from what the Court has articulated in the past.

Initially, the Court identified stream of commerce issues<sup>540</sup> and introduced them to the lower courts as the *stream of commerce model*, by using an existing *minimum contacts model* to assert jurisdiction.<sup>541</sup> Following the Court's identification of this new model, the lower courts started to use it in their analysis as they were all bound by the Court's precedents.<sup>542</sup> However, the Court's language in subsequent cases indicates that the *minimum contacts model* never meant to

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<sup>535</sup> *Holland v. United States*, 348 U.S. 121 (1954).

<sup>536</sup> *Id.* at 139.

<sup>537</sup> *United States v. Koehn*, 74 F.3d 199, 201 (10th Cir. 1996) ("The primary concern...is to penalize defendants who take advantage if a position that provides them freedom to commit or conceal a difficult-to-detect wrong").

<sup>538</sup> See *Nicastro v. McIntyre Mach. Am. Ltd.*, 201 N.J. 48, 75 (2010) (describing that "A State also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees"), *rev'd sub nom.* *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>539</sup> *Nicastro*, *supra* note 537, at 54; see also Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 262-268 (1998) (explaining the origin of stream of commerce theory).

<sup>540</sup> *World-Wide Volkswagen*, 444 U.S. at 286; *Asahi Metal Indus. Co.*, 480 U.S. at 102.

<sup>541</sup> See generally *McIntyre*, 56. at 873-87.

<sup>542</sup> See cases cited *supra* notes 4-8.

accommodate the stream of commerce analysis.<sup>543</sup> Thus, the Court's language clearly raises the concern that the *minimum contacts model*, once again, failed to provide successful resolution of the structural ambiguity in personal jurisdiction. Hence, the minimum contacts analysis should be abrogated, along with the distinction between the specific and general jurisdiction, in stream of commerce cases.

Instead, there are two types of transactions that may be construed as stream of commerce transactions: The first type is the stream of commerce through a private contract or a parent-subsidiary transaction. The second type is the international stream of commerce.<sup>544</sup> Asserting jurisdiction over the former type of stream of commerce cases are relatively easier to adjudicate in the State courts than the latter type. Hence, the stream of commerce and international stream of commerce require distinct and separate analysis.

In stream of commerce cases, orb-web corporations are unlikely to be actual participants because these types of corporations often conduct their businesses, as discussed in Part II, to avoid any liability.<sup>545</sup> Thus, an orb-web corporation's contractual relationship and liability pursuant to the Federal Rules of Civil Procedure (and similar State procedural rules) may be easily traceable and jurisdiction may be asserted, as discussed in Parts II and III.<sup>546</sup> If a plaintiff can show the precise relationship of the defendant with the forum State or the United States, then most courts will likely assert jurisdiction.<sup>547</sup>

However, stream of commerce issues often arise not when there is an indirect effort to sell products through stream of commerce by foreign or multinational corporations, but when a large corporation or manufacturer or seller of goods distributes its goods through an extensive chain of distribution as commingled products or through intermediaries.<sup>548</sup> To that end, there are two discernible schools of thought in the stream of commerce model.<sup>549</sup> In the United States, interstate and international commerce are controlled by Congress and by the executive branch through various international treaties.<sup>550</sup> Therefore, a State court's assertion of jurisdiction in the stream of commerce cases require an alternative approach.

### *B. The Stream of Commerce Model*

#### 1. A Rise of Concept through a Private Contract or an Agency-Based Transactions

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<sup>543</sup> See generally *McIntyre*, 564 U.S. at 873-92.

<sup>544</sup> See *infra* Part IV.C.

<sup>545</sup> See U.C.C. § 2-201, §2-106, § 2-103, §2-202, § 2-104, §2-207; see *supra* Part I.C. (diagram I).

<sup>546</sup> See discussion *supra* Parts I-III.

<sup>547</sup> *Id.*

<sup>548</sup> See *Goodyear*, 564 U.S. at 926; see discussion *supra* Part I.C.

<sup>549</sup> See discussion *infra* Part IV.B.,C.

<sup>550</sup> U.S. CONST. art.1, § 8, cl. 3.

Any transaction between two business entities often starts with a contract including simple “boilerplate contract terms,” including choice of law, warranty, trademark or licensing, and indemnification clauses.<sup>551</sup> A stream of commerce theory was recognized, for the first time, by the Court in *World-Wide Volkswagen Corp.*<sup>552</sup> In *World-Wide Volkswagen*, the plaintiffs alleged that while they were driving their newly purchased car purchased from the defendants, it exploded and severely injured them.<sup>553</sup> The plaintiffs brought a products-liability claim in Oklahoma State court against the defendants: (a) the automobile’s manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); (b) its importer Volkswagen of America, Inc. (Volkswagen); (c) its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and (d) its retail dealer, petitioner Seaway.<sup>554</sup>

World-Wide was incorporated and had its principal place of business in New York, which distributed vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York and two other States.<sup>555</sup> Seaway was incorporated and had its principal place of business in New York.<sup>556</sup> The Court found that neither World-Wide nor Seaway did any business in Oklahoma, shipped or sold any products to or from that State, had an agent to receive process there, or purchased advertisements in any media calculated to reach the Oklahoma market.<sup>557</sup> Rather than looking at the defendants’ contractual relationship, the Court said that the corporate defendants, automobile wholesaler, and retailer did not carry any activity in Oklahoma and did not avail themselves of the privileges and benefits of Oklahoma law.<sup>558</sup> The Court concluded that the defendants did not have the “*minimum contacts*” with Oklahoma sufficient to permit the Oklahoma courts to exercise jurisdiction even though the State long-arm statute conferred jurisdiction as permitted by the United States Constitution.<sup>559</sup> The Court noted that the purpose of due process was to provide reasonableness and fairness to the defendants, but mere foreseeability was not enough.<sup>560</sup>

There is no doubt that the stream of commerce notion explained in *World-Wide Volkswagen* was clearly meant to protect an orb-web corporation like World-wide Volkswagen

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<sup>551</sup> See generally BARBARA CHILD, DRAFTING LEGAL DOCUMENTS 112 (2nd ed.1992)

<sup>552</sup> *World-Wide Volkswagen*, 444 U.S. at 286.

<sup>553</sup> *Id.* at 288.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 289.

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at 295.

<sup>558</sup> See *id.* at 295.

<sup>559</sup> *Id.* at 289-90.

<sup>560</sup> *Id.*

and its affiliated entities.<sup>561</sup> For example, in *World-Wide Volkswagen*, first, there was a contractual relationship between the parties, including the plaintiff, who purchased the defective the products.<sup>562</sup> Second, the Court blended “*the minimum contacts*” analysis with purposeful availment and the assertion of jurisdiction through *the presence model* based on the relationship.<sup>563</sup> Third, the Court pointed out that uniformity was not permissible under the Commerce Clause, and the States were barred in asserting some economic activities.<sup>564</sup> Fourth, the Court said that reasonableness factors could be asserted in the federal courts and not in the State courts, but the State court could adjudicate whatever was present within its sovereign.<sup>565</sup> The last relevant point the Court made was that the plaintiff voluntarily traveled to and sued in Oklahoma, and the defendants did not sell any car in Oklahoma.<sup>566</sup> These four arguments completely *negate* the goal of the *minimum contacts model* because the Court’s opinion in *World-Wide Volkswagen* had barred the States from exercising jurisdiction over out-of-State defendants that are not “present.”

Under the stream of commerce theory, the Court held that the forum State was entitled to assert jurisdiction if “a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>567</sup> Thus, the Court presented a new model, called the *stream of commerce model*, with a catch of “purposeful availment.”<sup>568</sup>

## 2. Limitations Placed in Stream of Commerce Cases

In the aftermath of *World-Wide Volkswagen*, many lower courts started to apply the *stream of commerce* analysis under the *minimum contacts model*.<sup>569</sup> However, following the Court’s discussion of this rule, which limited assertion of jurisdiction in the stream of commerce cases,

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<sup>561</sup> See *supra* diagram I.

<sup>562</sup> *World-Wide Volkswagen*, 444 U.S. at 289 (“Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only”). It is also likely that these defendants were contractually bound with the plaintiffs when they purchased the vehicle from these defendants. However, no one looked at the defendants’ relationship with the plaintiffs before asserting jurisdiction.

<sup>563</sup> See, e.g., *McIntyre*, 564 U.S. at 883 (“Since *Asahi* was decided, the courts have sought to reconcile the competing opinions”); *World-Wide Volkswagen*, 444 U.S. at 299 (describing purposeful availment is required in stream of commerce cases); *Asahi Metal Indus. Co.*, 480 U.S. at 114-116, 117-120 (describing a stream of commerce theory and stream of commerce plus theory).

<sup>564</sup> See *World-Wide Volkswagen*, 444 U.S. at 299 (“whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State’s exercise of *in personam* jurisdiction over them.”).

<sup>565</sup> See *id.* at 293-94.

<sup>566</sup> *Id.* at 295-96.

<sup>567</sup> *Id.* at 297-98.

<sup>568</sup> See *supra* text and accompanying notes 537-66.

<sup>569</sup> See cases cited in *supra* notes 4-8

subsequent cases had considerable opportunities to modify the rule.<sup>570</sup> Nevertheless, the Court in *Asahi Metal Industry Co.* created two types of stream of commerce theories.<sup>571</sup> These early cases raised differing conclusions, but a bar to these differing conclusions was only reached in *McIntyre*.

*McIntyre* presents a great example of the States' limitations of the stream of commerce theory.<sup>572</sup> In *McIntyre*, the plaintiff brought a product liability action against McIntyre, a British manufacturer of a metal shearing machine, which severely injured the plaintiff's hand while using the machine.<sup>573</sup> The plaintiff was a New Jersey resident, was injured in New Jersey, and filed a case in New Jersey State court.<sup>574</sup> New Jersey was a correct forum because the plaintiff was a resident of the state, and the injury occurred in that state, and the defendant delivered its defective product that state.<sup>575</sup> Influenced by the Court's decisions in *World-Wide Volkswagen* and *Asahi*, the lower courts found that jurisdiction could not be asserted under the *presence* or *minimum contacts models* but rather under the stream of commerce theory.<sup>576</sup>

The Court, however, found against the plaintiff because he failed to establish a *prima facie* case that exercise of jurisdiction was appropriate against the foreign defendant.<sup>577</sup> Viewed in this light, the State of New Jersey had an unusually powerful interest in providing a convenient forum for the injured plaintiff.<sup>578</sup> The Court held that a non-resident defendant may "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.... But the general rule is inapplicable in this products-liability case, and the so-called 'stream-of commerce' doctrine cannot displace it."<sup>579</sup> The Court said that the Court's decision in *Asahi* was responsible, in part, for the lower court's decision to assert jurisdiction under the stream of commerce theory.<sup>580</sup>

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<sup>570</sup> See cases cited in *supra* note 537.

<sup>571</sup> See generally discussion in Part IV.

<sup>572</sup> See *supra* Part. IV.A.B.1-4.

<sup>573</sup> *McIntyre*, 564 U.S. at 878-79. J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise machines alongside its exclusive U.S. distributor, McIntyre Machinery America, Ltd. (McIntyre America). The conventions took place in various States, but never in New Jersey. However, out of this, only one machine ended up in New Jersey, sold and directly delivered to the plaintiff by J. McIntyre.

<sup>574</sup> *Id.* (stating that the metal-shearing machine was manufactured by J. McIntyre, incorporated and operated in England)

<sup>575</sup> *Id.* at 887; see also *supra* text and accompanying notes 537-49.

<sup>576</sup> *Id.* at 886-87 (plurality opinion).

<sup>577</sup> *Id.*

<sup>578</sup> *Id.* at 888

<sup>579</sup> *Id.*

<sup>580</sup> *Id.* at 881 (plurality opinion).



Generally, product liability claims arise by businesses engaged in the stream of commerce through exclusive distributors.<sup>581</sup> The Court's approach in *McIntyre* undercuts the rationale that these non-resident, foreign corporations certainly had consented to be sued in the United States by specially targeting the United States market to sell their products.<sup>582</sup> Arguably, one who sells its products in the United States and in the open market can be expected to be sued under an implied consent theory or a contract-based theory or an agency theory.<sup>583</sup>

### 3. Abrogation of State Long-Arm Statutes

Historically, State long-arm statutes were enacted in the wake of the Court's decision in *International Shoe* and its progeny.<sup>584</sup> In *McIntyre*, the New Jersey's long-arm statute, *Rule* 4:4-4(b)(1), granted jurisdiction to adjudicate cases involving a non-resident corporate defendant to the full extent permissible under the Constitution.<sup>585</sup> Put this way, States' long-arm statutes are enacted to provide access to their courts to enforce State laws.<sup>586</sup> In *McIntyre*, the Court sets a ground that in products-liability cases, a defendant's "purposeful availment" of the forum makes

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<sup>581</sup> Id. at 904 (Ginsburg, J., dissenting) ("McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States"); see *supra* discussion Part III.C.

<sup>582</sup> See *supra* notes 537-49 and accompanying text.

<sup>583</sup> See *supra* text and accompanying note 537; *Nicastro v. J. McIntyre Mech. Am. Ltd.*, 201 N.J. 48, 78-79 (2010), *rev'd sub nom. J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011). The New Jersey Supreme Court noted that

Those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events, and that the joint appearances by J. McIntyre and McIntyre America were calculated efforts to penetrate the overall American market. Plaintiff's employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre's machines. J. McIntyre may not have had access to McIntyre America's customer list, but J. McIntyre knew or reasonably should have known that its machines were being sold in States other than Ohio and in cities other than where the trade conventions were held.

J. McIntyre and McIntyre America shared a common name that may have suggested to unwitting members of the public some form of corporate relationship, despite the fact that both companies were independent business entities with different owners and management. The information sheet that accompanied the 640 Model Shear included J. McIntyre's address and telephone number and, according to the New Jersey businessman who purchased that machine, "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts." There can be little doubt that J. McIntyre and McIntyre America worked together to promote and sell J. McIntyre products in the United States as evidenced by their shared communications and joint participation at industry trade conventions.

<sup>584</sup> MILLER, *supra* note 39, at 51.

<sup>585</sup> *McIntyre*, 564 U.S. at 902-03 (Ginsburg J., dissenting) ("When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer").

<sup>586</sup> See *infra* notes 588-92 and accompanying text.

jurisdiction consistent with “traditional notions of fair play and substantial justice.”<sup>587</sup> The Court’s requirement of purposeful availment of the forum, however, bypasses the statutory authority granted by the State legislatures.<sup>588</sup>

The Court’s precise guideline in product liability cases continues to remain in some doubt. For example, the *McIntyre* Court noted that “a defendant’s placing goods into the stream of commerce “with the expectation that they will be purchased by consumers within the forum State” may indicate purposeful availment.”<sup>589</sup> The Court has advised that a defendant purposefully avails if he has an office in a forum State, pays taxes, owns a property in the forum, advertises or sends any employees to the forum.<sup>590</sup> These requirements give little guidance for determining what constitutes “purposeful availment” and provide no guidance for determining whether a defendant targets advertising to or sells his products in all fifty states.

Additionally, in *Bristol-Meyers Squibb Co.*, the Court held that “a corporation that engages in a nationwide course of conduct cannot be held accountable in a [S]tate court by a group of injured people unless all of those people were injured in the forum State.”<sup>591</sup> Under the majority opinion, the Court made it very difficult for plaintiffs to sue a defendant unless the defendant also resides in the forum state.<sup>592</sup> Thus, future mass tort action or stream of commerce cases will stand no chance at all.<sup>593</sup>

In considering the propriety of a State versus a federal forum, the presumption is that the State courts enjoy concurrent jurisdiction unless Congress has explicitly or implicitly reserved federal court jurisdiction.<sup>594</sup> Viewed in the light of a State long-arm statute and “purposeful availment” in recent cases, the Court’s guidepost forbids the States to assert jurisdiction under the long-arm statutes and compromises the States’ sovereign interests and federalism.<sup>595</sup>

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<sup>587</sup> *McIntyre*, 564 U.S. at 880.

<sup>588</sup> MILLER, *supra* note 39, at 51 (“State sovereignty involves the authority of a state to define and enforce its own laws. When a court considers state sovereignty in determining whether there is jurisdiction over a case, the court attempts to discern whether by deciding the case the court will promoting an interest the state has defined through its law”).

<sup>589</sup> *McIntyre*, 564 U.S. at 882 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 298 (finding that in *McIntyre* that expectation was lacking)).

<sup>590</sup> *Id.* at 886-87.

<sup>591</sup> *See Bristol-Meyers Squibb Co.*, 137 U.S. at 1784 (Sotomayor, J., dissenting)

<sup>592</sup> *See id.*

<sup>593</sup> *See id.*

<sup>594</sup> *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 (1981) (Powell, J.); *see also McIntyre*, 564 U.S. at 899 (Ginsburg, J., dissenting) (stating that “28 U.S.C. § 1391(a)-(b) in federal-court suits, whether resting on diversity or federal-question jurisdiction, venue is proper in the judicial district ‘in which a substantial part of the events or omissions giving rise to the claim occurred’”).

<sup>595</sup> *Gulf Offshore Co.*, 453 U.S. at 479 (citation omitted) (stating that “however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.”).

#### 4. Abrogation of “Minimum Contacts” and “Specific Jurisdiction”

As discussed earlier, recent cases point to the Court’s not committing itself to any formula in the stream of commerce cases. The Court summarized the law that “[i]f the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction.”<sup>596</sup> This means that an individual plaintiff must sue a corporate defendant in defendant’s home State, but if a plaintiff sues a non-resident defendant in the plaintiff’s home State, then “it would upset the federal balance, which posits that each State has sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on States, subjecting them to specific jurisdiction in those forums.”<sup>597</sup> The commission of certain “single or occasional acts” in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections.”<sup>598</sup> These lines of arguments can be approached from another direction. Few would dispute the correctness of the argument that the defendant’s forum connection must not be a “single or occasional act,” but it must be “continuous and systematic contacts.” Thus, a plaintiff is required to establish “continuous and systematic contact with the forum State to justify “purposeful availment.”<sup>599</sup> As a textual matter, failure to provide a forum is also said to infringe a plaintiff’s constitutional rights and the Court is not without notice of this fact.<sup>600</sup>

##### *C. The Stream of Commerce Model in International Transactions*

Modern advances in the transportation of products through the international stream of commerce makes it easier for a foreign corporation (or an orb-web corporation) to reach the United States markets. It seems reasonably clear that foreign corporations prefer to have their disputes resolved in their own courts unless they provide otherwise by contract. International stream of commerce analysis requires only a direct nexus between a cause and prejudice.<sup>601</sup> For example, in a breach of contract between the two foreign entities, the United Nations Convention on Contracts

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<sup>596</sup> *McIntyre*, 564 U.S. at 884 (plurality opinion).

<sup>597</sup> *Id.*; but see *Gulf Offshore Co.*, 453 U.S. at 479.

<sup>598</sup> *McIntyre*, 564 U.S. at 884 (plurality opinion).

<sup>599</sup> See *supra* discussion Part I-II; *McIntyre*, 564 U.S. at 888.

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here is sufficient. Rather, this Court’s previous holdings suggest the contrary.... And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place. *Id.*

<sup>600</sup> See, e.g., *McIntyre*, 564 U.S. at 894-910 (Ginsburg, J., dissenting).

<sup>601</sup> See *infra* notes 601-03 and accompanying text.

for the International Sale of Goods (CISG) allows a contract to be proved in international trade court even if the contract was not in writing.<sup>602</sup>

In addition, analogous to an individual's entry into the United States, many federal statutes and federal agencies regulate entry of products into the United States for sale, and all imported products are subject to Department of Commerce jurisdiction.<sup>603</sup> Agency determination under the Tariff Act of 1930 governs this area of law often through Court of International Trade.<sup>604</sup> International stream of commerce cases thus remain under the federal courts' jurisdiction, followed by the administrative agency determination.<sup>605</sup>

## V. CONCLUSION

Current personal jurisdiction models and courts' analyses are inconsistent and unclear in litigation involving an orb-web corporation. The Court's proposition is out of accord with the jurisprudence of clearly established theories or models. Under the rerouted approach argued in this article, orb-web corporations born in the United States and their foreign subsidiaries can be sued under the presence model, consistent with the United States Constitution. Likewise, foreign-born, orb-web corporations' subsidiaries located in the United States can also be sued under the presence model as a domestic corporation. Additionally, in stream of commerce cases, jurisdiction may be asserted depending upon the tribunal's fact-based determination as discussed above.

This article argues that the rerouted approach of personal jurisdiction will not create new administrative burdens. Although these approaches may depart from the traditional *minimum contacts model*, the minimum contacts model no longer serves the purpose of jurisdictional law; rather, it creates confusion and wastes judicial resources. Therefore, in future cases, *the minimum contacts* analysis should be abrogated from jurisdictional analysis. Based on today's corporate structures and forms, application of existing precedents stemming from the pre-industrial era are unfit and unconstitutional.

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<sup>602</sup> *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2nd Cir. 1995).

<sup>603</sup> *See United States v. Mead Corp.*, 533 U.S. 218, 232-35 (2001) (showing that Congress governs this area of trade and has exclusive jurisdiction pursuant to the U.S. trade policy).

<sup>604</sup> *See* 19 U.S.C. § 1605 *et seq.*

<sup>605</sup> A more thorough discussion of this topic is beyond the scope of this article, apart from here distinguishing two types of stream of commerce cases discussed earlier.